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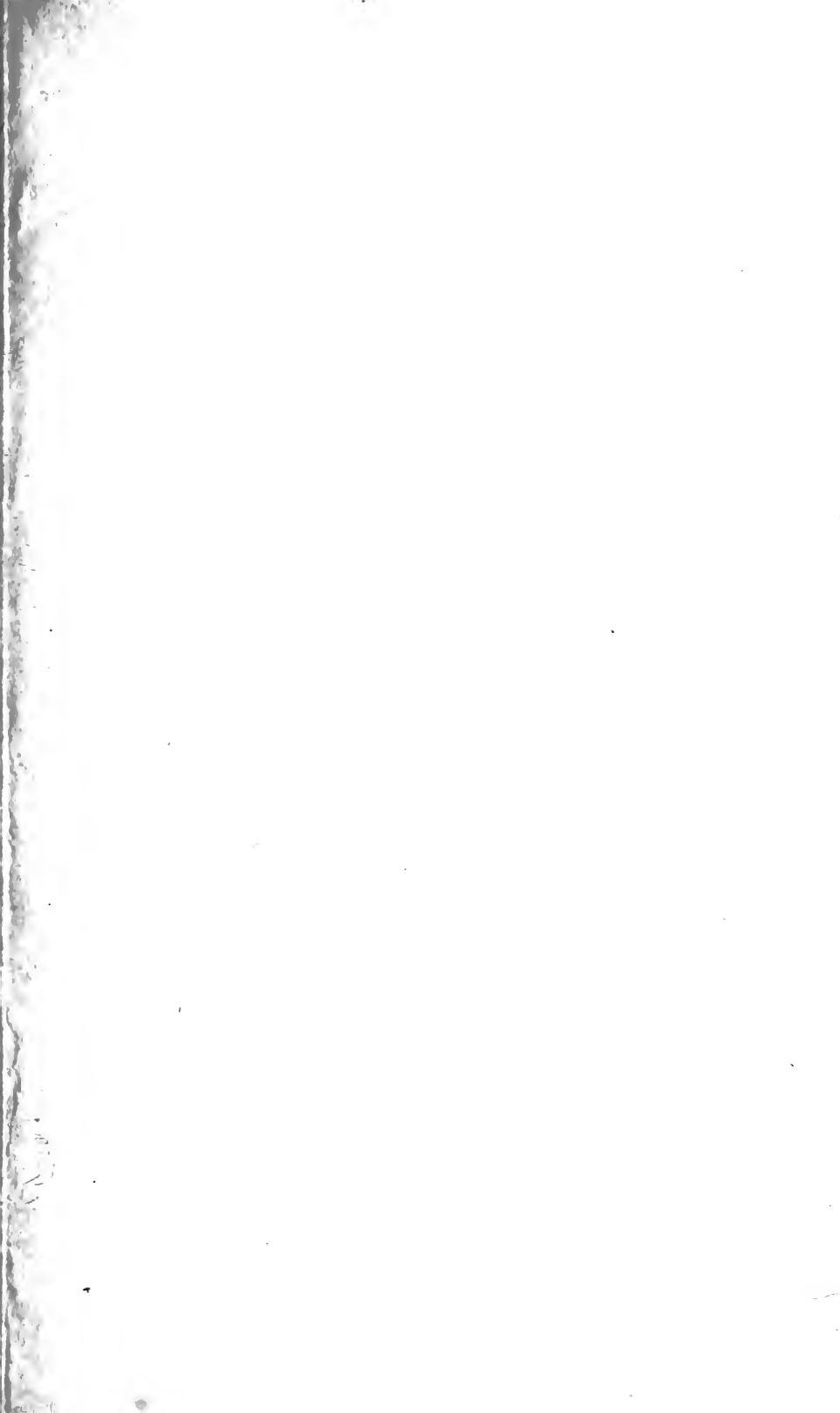
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vol. 2474
No. 11638

see vol. 2473
United States

Circuit Court of Appeals

For the Ninth Circuit

LOCAL 36 OF THE INTERNATIONAL FISHERMEN AND
ALLIED WORKERS OF AMERICA, JEFF KIBRE,
GILBERT ZAFRAN, CLIFFORD C. KENNISON, F. R.
SMITH, GEORGE KNOWLTON, OTIS W. SAWYER,
W. B. McCOMAS, HARRY A. McKITTRICK, ARTHUR
D. HILL, C. LLOYD MUNSON, CHARLES McLAUCH-
LAN, ROBERT M. PHELPS, BURT D. LACKYARD,
and RAY J. MORKOWSKI,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

In Six Volumes

VOLUME IV

Pages 1423 to 1902

**Upon Appeal from the District Court of the United States
for the Southern District of California
Central Division**

FILED
DEC 11 1947



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(Testimony of Jeff Kibre.)

The Court: Yes, I sustained the objection to these on the ground that they were remote. "I" on the ground they were remote and immaterial. And K, M and P——

(Some documents were handed to the court by the clerk.)

The Court: This was the witness Waissbord. Exhibit K, Mr. Rubin, Minutes of Barracuda Meeting May 6, 1943; is that in evidence otherwise? I remember P and M and N.

X, Mr. Clerk, and X-1.

* * *

The Court: You lodged your objection yesterday?

Mr. Rubin: Yes, the objection formally was made. Each and every part of the offer of proof is objected to on the ground of immateriality and remoteness, and the fact that it is self-serving, doesn't tend to prove or disprove any of the [2799] issues in the case.

The Court: The objection is sustained, except as to Exhibit K. I will reserve ruling on that. There has been some testimony on it, and I don't recall what the foundation was, or whether there was some testimony or not. I will rule on K later. [2800]

* * *

The Court: I am going to overrule the objection and let it in. [2810]

* * *

(The motion picture referred to was marked Defendants' Exhibit BB and received in evidence.)

* * *

The Court: We will now proceed. The defendants are offering a motion picture which will take about 20 minutes. The jury is instructed that it is to be received for the limited purpose of showing the general nature of the operation of a fresh fisherman in catching fish, and for no other purpose.

Proceed.

Mr. Kenny: It takes the number BB?

The Court: Yes. It will be Exhibit BB in evidence.

(The motion picture referred to was received in evidence and marked Defendants' Exhibit BB.) [2811]

The Court: Proceed.

JEFF KIBRE

called as a witness by and on behalf of the defendants, having been previously sworn, resumed the stand and testified further as follows:

Mr. Margolis: If I recall correctly, your Honor, there was a question which had been put but not answered when we recessed last night. I would like to have that read.

(The portion of the record referred to was read by the reporter as follows:

“Q. (By Mr. Margolis): The question refers to an agreement to maintain minimum price. Was that an agreement in writing or was that an agreement which was just an exchange of statements, oral statements?

(Testimony of Jeff Kibre.)

“A. The latter. That is, it was simply an agreement on the part—a meeting of minds was reached on the part of those present.

“Q. Will you tell us what was said on that subject?

“A. Yes. I pointed out to the fishermen that——

“Mr. Dixon: If the court please, I object. I don't think that is at all responsive. Here, again, this witness is starting out, ‘I pointed out.’ He has been asked a question of what was said, which we don't think is material, but we are not objecting to it at this time until we find out what the course of the examination is.

“The Court: The question is what was said, and when you said, ‘It was pointed out,’ that is a conclusion of the witness.

“Q. (By Mr. Margolis): Say what you said. Say, ‘I said,’ ‘He said,’ and so forth.”)

Redirect Examination

(Resumed)

By Mr. Margolis:

Q. You recall we were talking about the 1946 Barracuda Conference.

A. Yes, that is what I recall now.

Q. Now, will you answer that question?

(Testimony of Jeff Kibre.)

A. To the best of my recollection I recall that this is what transpired so far as statements: Bruce Martin made a statement and said something to this effect, that the fishermen couldn't possibly sign an agreement because they were dealing with something they didn't have, namely, fish in the ocean; and it was in answer to that that I got up and spoke and I said what the fishermen were seeking to do was to bargain for an agreement—— [2813]

* * *

The Court: All right. Proceed.

The Witness: So I told the fishermen—I mean those present that what the fishermen were endeavoring to do was to obtain an agreement from the fish dealers for the fish which they would deliver when they harvested that catch, an agreement similar to those which had been well established in agriculture for future deliveries, and then I went on to explain that——

Mr. Dixon: Now, if the court please, I rise again to object, because this is precisely what we feel is immaterial and self-serving. We are now apparently to hear another [2814] speech.

Mr. Kenny: I don't think this is fair referring to the testimony as a speech. He is relating what happened at a meeting and of course speeches take place, and I think counsel should be admonished not to belittle this witness' testimony by saying he is orating. He is making an honest effort to relate what took place at the meeting. I think we are entitled to have the jury admonished not to have the witness constantly belittled in this way.

(Testimony of Jeff Kibre.)

Mr. Dixon: If the court please, I believe this is redirect, and as I understand it redirect is confined to the extent of the cross-examination, and anything that is necessary to be explained in that cross-examination. I certainly submit that this is not an explanation in any sense of the term of anything that was gone into on cross-examination.

The Court: Well, I think the witness is getting a little more on the exposition side than the factual side. He is to state what the agreement was, in other words, what was said as to what the agreement was, and not what the argument was leading up to it, nor what his reasons were, but what was the agreement, if there was any made. I understand he said there was an agreement made at this meeting.

You recall you testified there was an agreement that the O.P.A. ceiling price would be the price at this meeting? [2815]

The Witness: It was just simply a meeting of the minds, that is, an agreement on the part of those present, that they should seek to have the OPA price remain.

The Court: You wanted to explain something about that and I have permitted counsel to ask you what was said with relation to the agreement.

Mr. Margolis: That was all said with relation to the agreement. That is part of the discussion.

Mr. Dixon: We submit it doesn't have any reference to the agreement, your Honor.

(Testimony of Jeff Kibre.)

The Court: I do not think so. Maybe the witness doesn't have anything else to say, I don't know.

Mr. Margolis: It is very hard to know. If I were a witness, it would be hard for me to know where to draw a line.

The Court: It is always very difficult to know where to draw the line.

Mr. Margolis: I would like the witness to go on with the answer, but I am not in a position to advise him. The only way I know, what we have offered at least is everything that was said with relation to the agreement. Now where the line is to be drawn, your Honor, I don't know.

Mr. Dixon: If the Court please, I believe this witness has already testified that there was an oral agreement, and I think that was the extent of my cross-examination.

The Court: Yes, that is right. [2816]

Mr. Dixon: I don't know what further need be said about it.

Mr. Margolis: If your Honor please, if there was an oral agreement, what was called for on cross-examination was a conclusion, was there an oral agreement.

The Court: Now you are asking him what was said to constitute the oral agreement. That isn't argument as to why they did this or why they did that or why something else.

Mr. Margolis: It is the sum total of the conversation that determines whether there was an agree-

(Testimony of Jeff Kibre.)

ment or what the nature of the agreement was. We are not in the position to separate it, your Honor.

The Court: I think the witness understands what we are driving at.

Mr. Margolis: I frankly do not.

The Court: Do you understand?

The Witness: Well, to tell you the truth, I am getting a little confused. I think maybe I can try.

Q. (By Mr. Margolis): Do you have anything to add to your answer, trying to confine yourself within the ruling as you understand it?

A. I am afraid I can't quite apply that.

The Court: Very well. Proceed, counsel.

Q. (By Mr. Margolis): I would like to put this question, your Honor: [2817] Will you tell us the rest of the conversation?

Mr. Rubin: Objected to on the same grounds.

The Court: Objection sustained.

Q. (By Mr. Margolis): Now on cross-examination you were asked by Mr. Dixon whether the dealers told you that they would not go along with the union's proposals. I want to ask you in connection with Exhibits A and B, which are, you will recall, the letters dated June 11, 1946, one addressed to the fresh fish dealers of the port of San Pedro and the other the reply, whether those were submitted at any time simply as proposals drafted by the union alone.

A. No. These were proposals that were drafted jointly by the dealers and the union representatives.

Mr. Dixon: If the Court please, I object to that. It has already been gone into on direct examination.

(Testimony of Jeff Kibre.)

The Court: Yes. It was gone into on redirect. It is not a new matter opened on cross-examination.

Mr. Margolis: The reason, your Honor, that I wanted to clarify this is that I objected to a question as assuming facts not in evidence.

The Court: It was gone into on direct examination, how those happened to be drafted, and so forth, at the meetings that were held.

For the benefit of the jury, the rule is that there is [2818] direct examination and there is cross-examination which permits touching upon the subject matters touched in the direct but if on cross-examination some new matter is brought up then the party who produced the witness may re-examine him concerning the new matter only.

Q. (By Mr. Margolis): At the meeting of June 15, the minutes of which are in evidence as Government's Exhibit 228, and the part as Defendants' Exhibit V, do you recall what you said and what was said at that meeting with respect to the dealers' reply of June 14 in which the proposals of June 11 were rejected?

Mr. Dixon: If the Court please, I object to that as having been already gone into on direct examination.

The Court: I think it was gone into on redirect too. I remember this witness testifying to it.

Mr. Margolis: Not with regard to this meeting.

The Court: On the meeting where the dealers' letter was considered? I think that was one of the things he testified to, that the dealers' letter was

(Testimony of Jeff Kibre.)

received and it was received while the meeting was in progress, or just before it, and he talked about it and read the whole letter.

Mr. Margolis: Your Honor please, here is my recollection of what the record shows: On direct examination I inquired about what was said and an objection was sustained on the ground that the minutes were sufficient to indicate what [2819] was said. On cross-examination Mr. Dixon opened the subject up but went into only part of what was said—I have not had the transcript for yesterday; it was just handed to me this morning so I don't have the page reference—but my notes show that he went partially into that discussion. I want to get the entire discussion in.

Mr. Dixon: If the Court please, I merely asked this witness on cross-examination whether the suggestions contained in one of the exhibits, the so-called reply of the dealers, was presented to the meeting. Your Honor will recall that.

The Court: That is right. Then when you had this witness on the stand the other day, over the objection of the Government I permitted him to testify in response to your questions that the whole letter was read to the dealers at that meeting. So the objection is sustained. Let us move on.

Q. (By Mr. Margolis): Now in the minutes of June 15, reference is made to statements of a complimentary nature made by you to the union. Will you state what you said in that regard? [2820]

(Testimony of Jeff Kibre.)

The Court: What compliments did you pay the union on the meeting of June 15, was the question.

The Witness: The main compliment that I paid them was with reference to certain proposals that were adopted at that particular meeting to strengthen, as they put it, the setup of the local union, particularly their financial condition, which had always been bad, and I complimented the membership there on the actions which they had taken. I thought that they had taken constructive action to improve the functioning of their union, to such an extent that the service to the members would be materially better.

I further complimented them on the conduct of the strike. I felt that they had conducted it in a manner very worthy of the best traditions of our organization. It has been conducted without any serious difficulties. It had been completely peaceful. And that all in all they had conducted themselves in a very responsible manner.

Mr. Margolis: We have no further questions.

* * *

Recross-Examination

By Mr. Dixon:

* * *

Q. (By Mr. Dixon): Is it a fact that Exhibit AA was the only contract that was submitted by Local 36 to the dealers in Santa Monica?

The Court: When?

(Testimony of Jeff Kibre.)

Q. (By Mr. Dixon): In 1944 during these discussions and negotiations you talked about that were had during that period.

A. This is the contract that we submitted at the meetings in the Western Seafood Institute when the conciliator was present to all the dealers in California. This was not submitted to the Santa Monica dealers, as I recall.

Q. What is the fact as to whether this is the contract or proposed form of contract that was submitted to the Santa Monica dealers in 1944—the San Pedro?

The Court: Submitted to the San Pedro dealers or Santa Monica? What is your question now?

Mr. Andersen: He changed in the middle, I believe.

The Court: You went from Santa Monica to San Pedro very quickly.

Q. (By Mr. Dixon): As I understood it from your examination yesterday, Exhibit AA was the contract or form of contract [2823] submitted to the Santa Monica dealers in 1944, is that correct?

A. No, no.

Q. Was that the type that was submitted to all the dealers in the southern part of California, in 1944 by Local 36?

* * *

The Witness: We may have submitted other contracts, but this contract was submitted to the dealers in connection with the meetings held in the

(Testimony of Jeff Kibre.)

Western Seafood office in the spring of 1944, at which time the conciliator was present. This is the contract.

Q. (By Mr. Dixon): I had previously asked you, Mr. Kibre, on cross-examination as to what other agreements, if any, were submitted to the Santa Monica dealers other than the two contracts that were signed by the Bay Fish Company and the other company in Santa Monica, do you recall that?

A. I don't recall that, no.

Q. Well, this is a question asked you by Mr. Margolis [2824] yesterday referring to Exhibit AA:

“And this is the agreement which you had reference to in answering Mr. Dixon when you said a different agreement, not a similar agreement, to the one submitted to the Santa Monica dealers was submitted to the other dealers, is that right?”

And you answered: “That is right.” Did you mean in your answer that Exhibit AA was the contract or form of contract that was submitted to the other Santa Monica dealers, as well as to all other dealers in the southern part of California?

Mr. Margolis: I object to that as assuming facts not in evidence, that there are any other Santa Monica dealers.

Q. (By Mr. Dixon): Are there just the two dealers in Santa Monica?

A. As far as I know, there are only the two dealers.

(Testimony of Jeff Kibre.)

Q. All right. That clears up that point. Then this was the exhibit or form of contracts, Exhibit AA, that was submitted to all the dealers in Southern California in 1944, including the Santa Monica dealers, is that correct?

A. I don't know whether the Santa Monica—you see, this agreement was submitted at the time that we had the meetings in the Western Seafood—

The Court: He wants to know whether the Santa Monica dealers were included or not.

The Witness: That is right. [2825]

Q. (By Mr. Dixon): Was that the only form of agreement that was submitted to the dealers in the Southern California area in 1944?

A. This is the only contract that I had any connection with in the spring of 1944 that was submitted. I wouldn't know. Maybe there were others.

Q. If there were any other forms of contract submitted, would you know about it?

A. Not necessarily.

Q. You were the International representative at that time, were you not, charged with the responsibility of helping the locals in their negotiations?

* * *

Q. (By Mr. Dixon): I hand you what is marked for identification as next in order, Government's Exhibit 57.

The Court: Government's 57 for identification.

(The document was marked Government's Exhibit No. 57, for identification.)

* * *

(Testimony of Jeff Kibre.)

Q. (By Mr. Dixon): I will ask you to examine the same and state whether you ever saw that contract or proposed form of contract before.

Mr. Andersen: That contract is unexecuted, isn't it?

A. I don't recall too well, but I do remember this, that the Local was working on a number of agreements at the time, and as I recall there probably were at least a half dozen contracts prepared from time to time by the Local.

Q. (By Mr. Dixon): All during the year 1944?

A. Oh, yes.

Q. Can you state to the court and the jury whether this contract or form of contract ever came to your attention?

A. Yes, I think it did. I am not positive.

Q. Will you state the circumstances under which it came to your attention?

A. I say as far as I know the Local was working on a number of contracts and they probably brought this to my attention for me to go over.

Q. Can you specify the time to the best of your recollection when it first came to your attention?

A. I think quite likely this contract was prepared in the summer of 1944 when the Local was seeking to enter into [2827] negotiations with the San Pedro cannery.

Q. Does the notation at the top of this exhibit "Revised for Cannery and Dealers" mean anything to you in connection with the time at which it was—

A. If I can look at the agreement I believe I will be able to tell pretty well.

(Testimony of Jeff Kibre.)

Q. All right.

A. As I recall now the Local was trying to prepare a contract which would be suitable both for canners and dealers, fresh fish dealers, and I would say this: that over a period of months they must have prepared and revised half a dozen agreements. Now, I would be coming in and out of town; I would be here maybe for a week and then out of town, and I would come in and they would show me these various agreements. I think this was the one prepared in the summer of '44 in connection with when the Local was seeking to negotiate with the canners.

Q. What does the reference to the dealers on the contract refer to?

A. Yes, as I say, they were trying to—they simply apparently took the agreement which had been prepared for the dealers at one time or another and were revising it so it would be suitable for dealers and canners.

Q. In any event, this was one of the forms of contract that was prepared by Local 36 in 1944, was it? [2828]

A. I would say it is one of a dozen contracts which they were working on tentatively.

Q. And can you state whether or not this form was prepared before or after Exhibit AA before referred to?

A. I really don't know exactly. I say to the best of my recollection that was prepared during the summer of '44 in connection with possible negotiations with the canners. [2829]

(Testimony of Jeff Kibre.)

Q. But you have no actual knowledge as to whether this was one of those contracts or forms of contracts submitted to the dealers in 1944?

A. I don't know. It may have been submitted to the dealers. The only agreement I know definitely about is the agreement that was submitted at the time the actual meetings took place. There were a great many tentative drafts of agreements prepared and informal discussions had with the dealers.

Mr. Dixon: We offer Exhibit 57 in evidence, your Honor.

Mr. Margolis: Objected to on the ground it is incompetent, irrelevant and immaterial.

Mr. Dixon: It is one of the forms of contracts.

The Court: Objection is overruled. Admitted.

(The document referred to was received in evidence and marked Government's Exhibit No. 57.)

Mr. Dixon: At this time I would like to read to the jury a portion of Exhibit 57, which bears at the top in pencil the words "Revised for Cannery and Dealers, Southern California Fish Stabilization Agreement," and begins as follows:

(At this point counsel read portions of Government's Exhibit 57 to the jury.)

Q. (By Mr. Dixon): You were asked yesterday, Mr. Kibre, by Mr. Margolis, whether at any time did the union ever give notice to either [2830] of the two dealers covered by Government's Exhibits 240 and 244, that they should not purchase fish from any fisherman.

(Testimony of Jeff Kibre.)

Q. And your reply was, I believe, that they did not give such notice to the Santa Monica dealers, is that correct?

A. I said, to the best of my knowledge I didn't know of any such notice.

Q. You testified yesterday, when the Court asked you, do you know, you answered as follows: "I am fairly well acquainted with the situation out there; yes."

Is that your answer that you wanted the jury to get from the question put to you by the Court?

A. Well, I meant it in this sense, that I am here in this area, or at that particular time, at least in '44 and up until '45, I am here for a couple of weeks at a time every couple of months and that I get reports, and it is my knowledge based on such reports, and from going to Santa Monica maybe once every three or four months and meeting with the union over there.

In other words, I don't have an exact knowledge of every day-by-day event. It would be impossible for me to have such [2831] knowledge.

The Court: Do you wish now to say that you do or do not know whether or not any notice was given? That is the point.

The Witness: I don't know of any notices myself; no.

The Court: Very well.

Mr. Dixon: In connection with Government's Exhibits 240 and 244, the Government offers what

(Testimony of Jeff Kibre.)

has been previously marked for identification as Government's Exhibits 245, 243 and 246 in evidence.

(Exhibiting documents to counsel.)

Mr. Dixon: And we will also ask leave to withdraw Exhibit No. 252 from that exhibit for identification and place the same number upon the original of said document and offer 252 for identification in evidence, together with the other exhibits named.

The Court: You are withdrawing the carbon copy of Exhibits 252?

Mr. Dixon: That is right.

The Court: And offering the original in place and instead of 252?

Mr. Dixon: That is right.

The Court: 252 is now in evidence?

Mr. Dixon: Not yet. It was marked for identification but was not offered in evidence. This is the one we are talking about, the carbon copy.

(The document referred to was passed to the Court.)

The Court: Have you seen Exhibit 252?

Mr. Margolis: Yes, your Honor.

The Court: And you are offering this in evidence?

Mr. Dixon: Yes, your Honor.

The Court: He is now offering the original letter of 252 in evidence in place and instead of the carbon which was heretofore marked for identification as 252.

(Testimony of Jeff Kibre.)

Mr. Margolis: It is identical?

The Court: No, it is not identical with the carbon. There is an insert in the body of the letter. It has signatures attached to it. Otherwise it appears to be identical.

What were the other exhibits? I will be looking at those.

(The documents referred to were passed to the Court.)

Mr. Margolis: We have no objection to the substitution, your Honor.

The Court: You are now offering 243, 245 and 246?

Mr. Dixon: That is right, as well as 252.

* * *

The Court: Admitted.

(The documents referred to were received in evidence and marked Government's Exhibits 243, 245, 246 and 252 respectively.)

Mr. Dixon: Exhibit 252 is a letter on the letterhead of the International Fishermen & Allied Workers of America, Berth 73, San Pedro, California, to the Santa Monica Seafood Company at Santa Monica, California, dated August 29, 1944, and reads as follows:

(At this point counsel read Government's Exhibit 252 to the jury.)

Mr. Dixon: Exhibit 245, marked "Supplemental Agreement," reads as follows, being dated August 30, 1944:

(Testimony of Jeff Kibre.)

(At this point counsel read Government's Exhibit 245 to the jury.)

Mr. Dixon: Exhibit 246, dated May 28, 1946, carbon copy of a letter addressed to the Bay Fish Market, Santa Monica, California.

(Whereupon counsel read from Exhibit 246 to the jury.)

Mr. Dixon: Exhibit 243 is a carbon copy of the same letter, dated May 28, 1946, addressed to the Santa Monica Seafood Company at Santa Monica, California.

* * *

Mr. Dixon: 414 and 413. We offer Exhibits previously marked for identification Government's 413 and 414 in evidence, your Honor.

The Court: Admitted.

(The documents referred to were marked Government's Exhibits 413 and 414, and were received in evidence.)

Mr. Dixon: We ask that these be shown to the jury at this time. They are rather long. They can be passed along and done rather quickly.

The Court: You have got two documents there, why don't you start one in the back row and one in the front row.

(Whereupon the exhibits referred to were handed to the jury.) [2835]

* * *

(Testimony of Jeff Kibre.)

Redirect Examination

By Mr. Kenny:

Q. The question was whether you have seen these exhibits now being circulated to the jury. This is the first time you have ever seen them?

A. I haven't ever seen them. I don't even know what this is. I am sitting here consumed with curiosity. [2836]

* * *

Mr. Kenny: We will have to await the answer until we can see what is being shown to the jury.

* * *

Mr. Kenny: We are talking about 414 and 413, your Honor.

The Court: All right.

(Slight delay while jury is looking at exhibits.)

Mr. Kenny: Can the witness see the exhibits now and answer my question?

(A paper was handed to the witness.)

The Court: That is what number?

The Witness: 413.

The Court: The witness has been handed Exhibit 413.

The Witness: No, I never saw or heard anything about this. This is the first time I have seen them.

Mr. Kenny: That is all. 413 is the same as 414.

(Testimony of Jeff Kibre.)

The Court: The bailiff is now handing the witness Exhibit 414.

The Witness: I never saw these before either.

* * *

The Court: The witness may step down.

Mr. Kenny: I just have one brief excerpt from this contract that I would like to read to the jury. Counsel read part of the contract. [2837]

* * *

(Whereupon counsel read portions of Exhibit No. 57 to the jury.)

Mr. Dixon: Your Honor, may I just read one other paragraph in view of what Mr. Kenny has read? It is very short.

* * *

The Court: The jury understands that they will have the whole contract at the appropriate time.

(Whereupon Mr. Dixon read a portion of Exhibit 57 to the jury.) [2839]

* * *

CLIFFORD C. KENNISON

Called as a witness by and in behalf of the defendants, having been first duly sworn, was examined and testified as follows:

* * *

The Clerk: State your name.

The Witness: Clifford C. Kennison.

The Clerk: Your address?

The Witness: 274 Viewland Place.

The Clerk: San Pedro?

The Witness: San Pedro.

(Testimony of Clifford C. Kennison.)

Direct Examination

By Mr. Margolis:

Q. Mr. Kennison, are you one of the defendants in this case? A. Yes, I am.

* * *

Q. You live at 274 Viewland Place?

A. I have a trailer at that address.

* * *

Q. Are you a fisherman? A. Yes.

Q. Is that what you do for a living?

A. For the most part; yes.

Q. Do you do anything else for a living?

A. Well, sometimes I supplement my income from labor, casual labor.

Q. What do you mean by casual labor?

A. Oh, such as washing the bottom of a boat, painting the bottom of a boat.

Q. That sort of thing, is that right?

A. Yes, sir.

Q. When did you start working as a fishermen?

A. In 1939.

Q. Have you worked as a fisherman continuously since that time doing, in addition as you indicated, casual labor? A. I have.

Q. What sort of work did you do before that?

A. Laborer, casual labor, you might say.

Q. Do you own a boat? A. No, I do not.

Q. Have you ever owned a boat? A. No.

Q. Do you own a share of a boat?

A. Not even a share.

(Testimony of Clifford C. Kennison.)

Q. Have you ever owned a share in a boat?

A. No.

Q. Then all of the time that you have worked as a fisherman have you worked on other persons' boats? A. Yes, I have.

Q. And on what kind of a basis?

A. On a share basis.

Q. In other words, you receive a certain share of the catch, is that right? A. Yes.

Q. Now during the time that you have been fishing since 1939, have you been fishing cannery fish or market fish or both? [2842]

A. Both.

Q. Could you give us an indication of the proportion?

A. Well, I would estimate three-quarters of the time fishing for cannery and about one-quarter for markets.

Q. One-quarter of the time for fresh market fish and the rest of the time for cannery fish, is that right? A. Yes. [2843]

Q. Now, what have been your earnings as a fisherman since 1939?

Mr. Dixon: If the court please, we object to that question as being wholly irrelevant and immaterial.

The Court: Objection sustained.

Mr. Margolis: I would like an opportunity to be heard on that, your Honor.

The Court: I think you have enlightened me in connection with that matter in the course of the

(Testimony of Clifford C. Kennison.)

nine or ten weeks we have been hearing the various phases of this case. The objection is sustained.

Q. (By Mr. Margolis): What proportion of your earnings have come from cannery fish and from fresh market fish?

Mr. Dixon: Same objection, your Honor.

The Court: Overruled.

The Witness: Can I have the question?

(The question was read by the reporter.)

A. I can't give you a definite proportion on that, because I have no way of—an estimation, I would say in about the same proportion as the time I fished.

Q. (By Mr. Margolis): I see. Have you fished on just one boat or on a number of boats?

A. I have fished on a number of boats.

Q. About how many?

A. At least a dozen. [2844]

Q. Were those boats all small boats or all large boats, or were some small and some large?

A. Small boats, I believe you would classify them.

Q. What have been the sizes of the crews on the boats on which you have fished?

A. Generally two; sometimes three.

Q. When you say two and sometimes three, you mean, for example, when you say "two" you mean one in addition to yourself, and when you say "three" you mean two in addition to yourself, is that right?

A. That's right.

(Testimony of Clifford C. Kennison.)

Q. On these boats, when they have caught fresh market fish have you been familiar with the method of disposal of that fish to the dealers?

A. Yes, I have.

Q. Tell us what the practice has been with regard to sale of fresh market fish on those boats on which you have fished to the dealers. [2845]

* * *

A. As we come from fishing we tie up at the fish market dock, and then one of the crew proceeds to the dealers that he knows.

* * *

A. (Continuing): Go to a dealer that we know perhaps better than other dealers, state that we have fish on the boat in our catch. Ask him how much he will take. If he doesn't take them all, then we proceed to other dealers and see if we can dispose of the balance of the catch.

* * *

Q. On these boats on which you have fished you say that a fisherman goes to a dealer that he knows. State whether or not there was any practice on these boats with regard to giving preference to certain dealers or going to certain dealers first.

A. Yes. [2846]

Q. State what that was.

* * *

The Witness: We have favored dealers, dealers that we know, buyers we know who buy of us.

* * *

(Testimony of Clifford C. Kennison.)

The Court: I think it has. Is there anything else you do about selling the fish in practice with reference to these dealers?

The Witness: Well, yes, there is. [2847]

The Court: What is it?

The Witness: We find out what they are going to give us for those fish.

The Court: That is, you go to your favored dealer and find out what he is going to pay you?

The Witness: Generally that is so.

Q. (By Mr. Margolis): Then what happens? He says he is going to pay a certain price. Then what do you do?

A. Proceed to fill his order.

Q. And if there is any fish left over then you go to another dealer, is that right?

The Witness: That is right.

The Court: In your experience have you gotten different prices for the same species of fish on the same day from different dealers? A. No.

Q. Did you mean by that that you always get the same price? Is that what you mean?

A. That is what I mean. [2848]

* * *

Q. (By Mr. Margolis): Before you went fishing did you ever inquire about the price of fish that was being paid at the time that you went fishing?

A. Yes, I have.

Q. When you have come back from fishing, has the price always been the same or has it sometimes

(Testimony of Clifford C. Kennison.)

been different from the price that you were informed about at the time you went fishing?

* * *

The Witness: Many times it is different.

* * *

The Court: Sometimes it is the same?

The Witness: Sometimes.

The Court: When it is different it is more or less?

The Witness: Generally less. [2850]

* * *

Q. You have testified that there have been times that you have inquired about the price of fish before you went fishing. A. Yes.

Q. Now that price that you learned, state whether that was the price being paid at that time for fish being brought in at that time or whether that was the price which was being offered to you when you brought in fish after your trip.

Mr. Dixon: If the Court please, I object to that question on the further ground it is entirely too broad. What [2851] this witness catches may not be the same thing that is being sold or the price of the fish that he goes out fishing for.

The Court: It is complex and compound. I do not know what you are driving at.

Before you go out fishing, do you make a deal to sell your fish that you are going to catch, is that what you want to know?

The Witness: No.

Mr. Margolis: That is one of the things.

(Testimony of Clifford C. Kennison.)

Mr. Rubin: He has answered it no, your Honor.

The Court: All right. [2852]

* * *

Q. (By Mr. Margolis): Did you have a conversation during the month of June, 1946, with a man by the name of Pizzo? A. Yes.

Q. Do you recall when that conversation took place in June?

* * *

A. The first week in June.

Q. (By Mr. Margolis): All right. Where was it?

A. Flight Brothers Yacht Anchorage in San Pedro.

Q. Incidentally, you have always done all of your fishing from San Pedro, is that right?

A. No.

Q. Where else have you fished from?

A. I have fished out of Newport, Santa Monica, San Diego, Astoria; Newport, Oregon.

* * *

Q. Going back to this conversation, who was present besides yourself and Mr. Pizzo?

A. Members of his crew.

* * *

Q. Will you tell us what was said?

A. I asked Mr. Pizzo if he had registered for picket duty. His answer was no. I again asked if he would cooperate with us in maintaining the picket line. His answer was that they had too much work on the boat. That was a rather short answer, and it terminated the conversation.

(Testimony of Clifford C. Kennison.)

Q. Did you have a subsequent conversation with him? A. I did.

Q. When was that?

A. A few days later. Practically the same conversation. I went farther explaining about our position, asking co-operation from the small boat fishermen and making the duty less on the picket line by having more pickets. His answer was, again, that he was busy on the boat. And that terminated the conversation.

Q. Do you know whether his boat went fishing during the month of June, 1946?

A. Yes, I do.

Q. Did it? A. It did.

Q. Did it get clearance from the union before it went fishing?

A. No, it didn't get any clearance. [2856]

* * *

Q. My Mr. Margolis: Was any action taken at all by the union or by yourself or any of the other defendants in this case with regard to his fishing?

* * *

A. No.

* * *

Cross Examination

By Mr. Dixon:

Q. Mr. Pizzo was not a member of Local 36, was he, Mr. Kennison? A. No.

Q. You say you had these two different conversations with him on two different days in which you asked him to do some picketing, is that correct?

* * *

(Testimony of Clifford C. Kennison.)

Q. Just what did he tell you, Mr. Kennison, when you asked him to do picket duty?

A. He said he was busy working on his boat.

Q. Did he tell you that he would do some picket duty with you against the San Pedro dealers?

A. No, he didn't say he would.

Q. Did he tell you that he didn't want to do any picket duty.

A. No, he didn't say that.

The Court: Did he do any picket duty?

The Witness: No.

* * *

Q. (By Mr. Dixon): It is a fact, is it not, Mr. Kennison, that Mr. Pizzo did do some picket duty during the strike in June?

A. I have no way of knowing who all done picket duty, but I have been given to understand that he didn't. [2859]

* * *

The Court: Sustained.

I understand you to say then that you don't know whether he did any picket duty or not?

The Witness: That would be correct.

* * *

Q. (By Mr. Dixon): Then if Mr. Pizzo testified that you told him in one or two of these conversations that you have described that you had with him that "you better do picketing" you would say that you didn't have that conversation with him, is that correct?

OTIS W. SAWYER

called as a witness by and in behalf of the defendants, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Andersen:

Q. Your name is Otis W. Sawyer?

A. Yes, sir.

Q. You are known as Tom Sawyer?

A. Yes.

Q. And the person referred to in these proceedings as Tom Sawyer is you, Otis W. Sawyer?

A. Yes, sir.

Q. You are one of the defendants in this case?

A. Yes, sir.

Q. In 1945 or 1946 you were a fisherman?

A. Yes, sir, I was fishing most of the time in 1946 and most all of the time in 1945. [2861]

Q. And you are a member of Local 36, the defendant union here? A. Yes, sir.

Q. How long have you been a commercial fisherman?

A. I started fishing commercially November 1, 1944.

* * *

Q. Where do you live, by the way?

* * *

A. My home is Torrance, California.

Q. You are married, are you? A. Yes, sir.

Q. Family? A. Yes, sir.

(Testimony of Otis W. Sawyer.)

Q. What did you do before you were a fisherman? A. I was an oil worker.

Q. In this general locality?

A. Yes, sir. I worked for the Bankline Oil Company.

Q. And when you started fishing, did you fish as a fisherman or did you own a boat, or how did it work?

A. I started as a fisherman, yes, sir.

Q. In this locality? [2862]

* * *

A. No, sir, at San Pedro.

Q. When you fished I assume that you also fished on the usual share basis?

A. I did; yes, sir.

Q. Usually how many men would be on the boat that you would fish on? A. Two of us.

Q. And these boats work on the same general share basis that has been mentioned here, is that correct?

A. Yes, sir; all boats work like that.

Q. They all work under the same general plan?

A. Yes, sir.

Q. Did you ever own a boat? A. Yes, sir.

Q. What was the name of it?

A. Mary Jane.

Q. When did you buy it?

A. I bought that boat some time the first part of 1945.

Q. What did you pay for it?

(Testimony of Otis W. Sawyer.)

A. Well, I paid actually cash for the boat \$3000 and I had about \$1400 in equipment.

Q. About what?

A. About \$1400 in equipment on it. I paid about \$4400 altogether. [2863]

Q. Did you use that boat in fishing?

A. Yes, sir, when it was running.

* * *

Q. How long did you own the boat?

A. Well, I owned the boat a little over a year.

Q. During that year did you use it in the local fisheries? A. Very little. [2864]

Q. About how much of that time did you use it?

A. About a third of the time that I owned a boat.

Q. What did you do the other two-thirds of the time?

A. I was trying to repair that engine I had in it most of the time.

Q. Did you do any other fishing during that time? A. I did, off and on.

Q. When you weren't trying to fix the engine you were fishing on another boat, is that it?

A. Yes, sir.

* * *

Q. You bought the boat when?

* * *

The Court: He said the early part of 1945.

Q. (By Mr. Andersen): When did you sell it?

A. Some time in the spring of 1946. That was some time in April or May, I forget when it was.

(Testimony of Otis W. Sawyer.)

Q. Did you sell it or was it foreclosed?

Mr. Dixon: Now, if the Court please——

The Witness: I had to sell it.

The Court: He sold it, he said. The whole thing is immaterial.

Mr. Andersen: May it please the Court, we want to show through this witness, and we think it is material——

Mr. Rubin: We submit that if there is to be an offer of proof it should be made out of the presence of the jury.

The Court: Yes. I apprehend what the offer is and what you are going to offer to prove in connection with the matter.

Mr. Andersen: I think the Court's apprehension is substantially correct.

The Court: But I do not think it is material, counsel, at all. He might have had a boat and only fished with it one day, and he might have spent all his time repairing it and the reason for it might have been because he was poor, because he wasn't making any money, or because he just liked to do it.

Mr. Andersen: He didn't sell it because he wanted to sell it, Judge.

The Court: And there isn't any way that anybody can test the veracity of his testimony in that respect, so the objection is sustained.

Mr. Andersen: With respect to the latter statement, he of course could be subjected to cross examination on any aspect of it. [2866]

The Court: The objection is sustained. Let's get on.

(Testimony of Otis W. Sawyer.)

Q. (By Mr. Andersen): How long did you fish as a commercial fisherman altogether, either for yourself or other people?

A. Well, altogether it was around two years. That is the whole total time working on my boat and fishing for someone else and the elapsed time that went on.

Q. Did you have any particular markets that you sold your catch to?

A. Yes, I had favored markets.

Q. What was the arrangement, if any, that you had with them for the sale of your fish?

A. There was no arrangement whatever. I never made an arrangement.

Q. Did you ever try and make an arrangement with them?

A. Sometimes I would go in to one of them and see if he would buy fish or not, but they would never say they would buy it.

Q. Would you explain the general method you used in selling your catch?

A. Well, I would get up on the dock and see if I could get a reasonable price for my fish.

* * *

Q. (By Mr. Andersen): Well, then, when you came in with a load of fish, just explain in your own words how you would dispose of them.

A. I would come up to the dock and tie up and get up on the dock and go talk to those dealers that I knew better than others.

(Testimony of Otis W. Sawyer.)

Q. Where would you have to go to talk to the dealers? A. Walk in their markets.

Q. Walk to their markets? A. Sure.

Q. And usually how far away from where your boat was tied up would their markets be?

A. Well, that is a problem. Sometimes you tie up at the end of Pedro dock, and sometimes you tie up in the middle. That dock must be around 400 foot, 500 foot long.

Q. And would you walk to their places of business? A. Yes.

Q. And you would dicker with them for the sale of the fish, would you?

A. I don't know what you mean by "dicker." I would just ask them how much they were paying.

Q. Was there ever any variance from one dealer to the next? [2869]

* * *

The Witness: There was. There was one or two times, the only times I was fishing that I ever got any differences in price between them.

Q. (By Mr. Andersen): One or two times?

A. Yes; not over that.

Q. In all of those years? A. Yes.

Q. The rest of the times would the price be the same? A. Yes, I always found it the same.

Q. By the way, who had the mortgage on the boat you owned?

Mr. Dixon: If the court please, I object to that as wholly immaterial.

(Testimony of Otis W. Sawyer.)

The Court: I take it that counsel knows the answer to that question or he wouldn't have asked it.

Mr. Andersen: Yes, your Honor, I know.

The Court: It would not be material unless the mortgage was held by the person to whom he was under obligation to sell his fish to.

Mr. Andersen: I think we can bring that out also.

The Court: I will overrule the objection, and if that is not the fact I will strike the answer and instruct the jury to disregard it. [2870]

Did you have a mortgage on your boat to the fellow you sold your fish to?

The Witness: Not my fresh fish, no. My canned fish.

The Court: You fished for canned fish too?

The Witness: Yes, to a certain extent.

Mr. Dixon: I renew my objection in view of the answer.

The Court: The objection is sustained. It is immaterial.

Mr. Andersen: May I argue that briefly, your Honor?

The Court: Counsel, I think we have been over that often enough that I have about as good an idea as I am ever going to have as to what your idea is of the case and the reasons for it. The objection is sustained. It is immaterial what his arrangement with the canner was.

Mr. Andersen: All right, your Honor.

(Testimony of Otis W. Sawyer.)

Q. (By Mr. Andersen): When you would come in with your fish, would you usually sell it to one dealer or more than one dealer?

* * *

A. No, I usually went—if I had a great deal of fish I would try to give, divide all my fish up to all the dealers; but if I had a limited amount I would try to sell to my best friends on the dock there.

Q. (By Mr. Andersen): Why would you do that?

A. Because when I got an overload sometimes these friends would take the rest of them.

Q. Otherwise you would split it among all of them?

A. Yes, I would; I would try to.

Q. Do you know a man named Falcone?

A. Yes.

Q. Did you have any discussion with him at any time regarding any picketing?

A. I believe I did.

Q. When did you have the conversation?

A. I don't know. I forget that. It might have been the first part of the strike, for all I know, but I don't remember.

Q. Do you remember where it was?

A. I think it was at the tanning tank there at the fish dock, I believe.

Q. Do you recall the conversation you had with him?

A. No, not word for word, I don't.

Q. Nobody can ever remember a conversation verbatim, but just the gist of it.

(Testimony of Otis W. Sawyer.)

A. I believe I asked him would he do or would he help us do some picket duty, and he said he would.

Q. Did you explain to him the reasons why?

A. He knew the reasons why. [2872]

* * *

Q. (By Mr. Andersen): Did you have one or more conversation with him?

A. I don't remember whether it was one or two. There might have been two.

Q. Do you know if he actually did any picketing?

A. Well, as far as walking the picket line he didn't, no.

Q. Do you know what, if anything, in the nature of picketing he did? A. Yes, I do.

Q. What was that?

A. He asked me if he—he come to me and asked if he did some picket duty could he work on his nets at the same time, and I said, "Of course you can. You come down in the afternoon from 6:00 to 12:00 if you care to and tan your nets then." [2873]

Q. Do what? A. Tan his nets.

Q. What do you mean by tanning nets?

A. They have a certain procedure that they make out a tan bark in hot water to tan their nets. [2874]

* * *

Q. (By Mr. Andersen): I direct your attention to the conversation you had with Mr. Falcone on the fish docks there, and ask you if at any time you ever told him that if you don't picket we might make it tough for you?

(Testimony of Otis W. Sawyer.)

A. I can't ever remember having said that statement. No, I didn't make any statement like that.

* * *

Q. (By Mr. Andersen): Do you know how long Mr. Falcone picketed, over what period of time?

A. Yes, I think he was there three, probably four [2875] times in the evening.

Q. Were you friendly with him?

A. Very friendly. Still am.

Q. You had some sort of a position with relation to picketing, didn't you?

A. I was on—one of the registration committee, yes, sir.

Q. During the period of the strike did you have many conversations with Falcone from time to time?

A. Yes, most every evening I talked to him.

Q. You got along with him in a friendly manner, didn't you?

A. Very friendly yet, yes, sir.

Q. Do you know a man named Chigi?

A. Yes.

Mr. Andersen: You will find the reference on page 945 of the record.

Q. (By Mr. Andersen): Do you recall having any conversation with him about picketing?

A. Yes, I think I talked to him one time about picketing.

Q. Do you remember where it was?

A. I think he was patching his nets there at the net drying rack, at the tanning bark tank.

(Testimony of Otis W. Sawyer.)

Q. Did you have any conversation regarding him, that is, [2876] Mr. Chigi, and he performing picket duty?

A. Yes, I asked him when he was going to do it. He said he would. He told me at the very first of the strike that he might do picket duty, and I wanted to know when he was going to do it.

Q. What did he say?

A. He said he had too much work, he couldn't do it right then.

Q. Do you know if he ever did any picket duty?

A. Well, I believe he did, but I can't be sure. I believe he did, though.

Q. Did you get along with him in a friendly way?

A. Yes.

Q. Did you have any arguments or fights with him.

A. I don't argue with anybody.

Q. I beg your pardon?

A. I don't argue with anyone.

Q. During the time that you fished did your earnings ever exceed \$1500 a year?

Mr. Dixon: I object to that, your Honor, as immaterial.

The Court: Objection sustained. [2877]

Cross-Examination

By Mr. Dixon:

Q. Now Mr. Falcone was not a member of Local 36, was he, Mr. Sawyer?

A. No, I don't believe he was.

(Testimony of Otis W. Sawyer.)

Q. And in your conversation with him, did you ask him to do some picket duty against the dealers there at San Pedro?

A. I don't know whether I asked him or not. I asked him whether he would cooperate and help us do some.

Q. Did you ask him as follows: "You fellows have to picket to go out again or else you have to stop fishing?"

A. Not in those words; no.

Q. Did you tell him in different words but to the same effect?

A. I don't know about the effect. I didn't talk in those words.

Q. Did you tell Mr. Falcone that he would have to do some picket duty if he wanted to go out fishing, or words to that effect?

A. No, I did not say that. I said it was customary for the fishermen to do some picket duty to get a clearance card to go fishing.

Q. Even though they were not members of Local 36?

A. That is true; yes.

Q. Did you ever have any conversation with this witness [2879] about where he could sell any fish that he caught after he got a clearance card from the union?

A. With which witness? Falcone?

Q. Yes, Falcone.

A. No, I never told him where he could sell any fish at. I think it was Newport or Santa Monica, but I never told him.

(Testimony of Otis W. Sawyer.)

Q. In other words, any fish that was caught by the fishermen who did the picket duty and got the clearance card could be sold at Newport or Santa Monica, is that correct?

A. I don't know. I didn't have anything to do with that at all.

The Court: Did you know where anybody could sell his fish if he caught it during the strike?

The Witness: Yes, sir. I understood they could at San Diego, Newport, Redondo Beach, Venice, half a dozen places, Santa Barbara, where they could have taken it if they wanted to.

Q. (By Mr. Dixon): You mean that the dealers who had signed the contract at those ports could?

A. No. It is all according to where the fishermen were fishing at, what would be their closest port.

Q. San Pedro was the closest port, was it not, from which Mr. Falcone went out in his boat? Wasn't that his home port? [2880]

A. I believe Falcone was fishing shark and his gang were fishing shark and hauling them to Los Angeles, the carcasses.

Q. Do you know whether Falcone brought any fish into the San Pedro port while you were on picket duty?

A. Yes, he did. He and his boys did bring in fish, that is, shark carcasses in, and he hauled them to Los Angeles, he told me.

Q. Was that the shark that were thrown overboard, do you know?

(Testimony of Otis W. Sawyer.)

A. I have seen lots of sharks thrown overboard; tons of it.

Q. Now did you have this conversation with Mr. Falcone: "If you guys don't picket we might make it tough for you?"

A. I don't remember that conversation; no.

Q. You don't remember it now?

A. I don't remember it at all; no.

Q. Do you remember whether you had a conversation with him in words substantially to that effect?

A. No, I wouldn't say I would say that to no one.

Q. Would you say that you didn't have such a conversation, Mr. Sawyer?

A. I would say I would not have such a conversation as that, yes, that is right. I did not have such a conversation. [2881]

Q. Now, Mr. Chigi was not a member of Local 36 either, was he?

A. I don't know. He might have been. I don't know whether he was or not.

Q. Did it make any difference whether a fisherman was or was not a member of Local 36, as to whether he had to do picket duty to get a clearance card?

A. Well, no, not to get a clearance card, but it made a difference whether he was a union member or not.

Q. Did you state to this witness that he could have no clear card because he got no picket, or words to that effect?

(Testimony of Otis W. Sawyer.)

A. I think it was customary for all pickets to have a certain amount of time, for all fishermen to have a certain amount of picket time, before they could go out.

The Court: His question is whether or not you said that.

The Witness: No, I don't know. It might have been something similar, but in those words, I never spoke to a man like that in my life.

The Court: Well, Mr. Chigi apparently had difficulty in speaking English.

The Witness: I know he did; yes.

The Court: You understood what he was saying though?

The Witness: Yes, sir, I understood him. I talked to him quite a few times. [2882]

Q. (By Mr. Dixon): Did you have any conversation with Mr. Chigi in which you told him that he could fish for three days if he did picket duty?

A. I think that was the way the committee explained it to me, that he had a certain amount of time set up in those days where you could only go out so many days to fish because we didn't have enough pickets. But the way the committee explained it to me, he was allowed so many days and he should come back again and do some more picket duty, four hours, until he was issued another card, something to that effect.

Q. Chigi got a clear card from the union?

A. I believe he did. I believe most of the fellows did.

(Testimony of Otis W. Sawyer.)

Q. And he went out fishing, did he?

A. I am pretty sure he went fishing.

Q. Did you tell Mr. Chigi where he could sell his fish when he went out after he got this clear card?

A. No.

The Court: You say the committee. What do you mean by the committee?

The Witness: There was a group of men, a strike committee. There was a group of men that acted upon each individual man's suggestion that he go out, or application that he go out, and this committee had allotted so many hours of picket [2883] duty to allow this person to go out, I think it was four hours every five days, something like that, because there wasn't enough picket men to go around.

The Court: All right.

Q. (By Mr. Dixon): Did you at any time tell Mr. Chigi that he would have to sell his fish to Martin at Newport?

A. No, sir, I did not.

Q. Now after he got this clear card the first time and came back into port, did you have any other conversation with him about doing picket duty again?

A. I might have, but I can't remember whether I did or not.

Q. Did you tell him, "Picket or you can't go fishing any more?"

A. I don't remember saying that to him; no.

Q. Would you say that you didn't say that, Mr. Sawyer?

(Testimony of Otis W. Sawyer.)

A. I won't say I didn't say that, but I say I can't remember whether I did or not.

Q. Then it is possible that you told——

A. It could have been possible.

Q. ——Chigi that he couldn't go fishing any more unless he picketed?

A. I was in no position to tell him anyway.

* * *

FORREST R. SMITH

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Andersen:

Q. Your name is Forrest R. Smith and you are one of the defendants in this case? A. Yes.

Q. And you are a fisherman by occupation?

A. Yes.

Q. How long have you been a fisherman?

A. Since I was about 12 years old. [2886]

Q. By that do you mean that you have been a commercial fisherman since that time?

A. Not entirely, no.

Q. Approximately how many years of your life, then, have been devoted to commercial fishing?

A. I fished from the time I was 12 years old until 1917, and I joined the Navy in the First World War. I came out of the Navy in 1920 and I worked on ferry boats and was in the garage business and radio business until 1934 or '35, along in that neigh-

(Testimony of Forrest R. Smith.)

borhood, and then I went back fishing again and I have been there ever since.

Q. You resumed fishing, then, in about 1935?

A. Yes.

Q. Where did you resume fishing?

A. San Pedro.

Q. And that is what is called your home port, is it?

A. Yes.

Q. Do you own a boat?

A. Yes.

Q. What is the name of the boat?

A. The present boat I own, you mean?

Q. Yes.

A. Irene F.

Q. What is the cost of the boat?

A. The boat originally cost me \$2,000. [2887]

Q. Is this the first, second or third boat you have owned?

A. Third boat.

Q. When did you buy this boat?

A. 1941.

Q. Was the boat bought entirely by you or was it bought by you in company with somebody else?

A. I had a partner.

Q. Who was the partner?

A. A man by the name of C. P. Reed.

Q. Was he a fisherman too?

A. Yes.

Q. Was the boat bought by your money or was it financed by any company?

A. It was financed in its entirety by the Coast Fishing Company of Wilmington.

Q. Coast Fishing Company of Wilmington?

A. Yes.

Q. What is their business?

A. Canneries. [2888]

* * *

(Testimony of Forrest R. Smith.)

Q. Up until the time of this strike and at the present time, you are engaged in fishing, are you, or, we will say, up until the time of the strike?

A. Yes.

Q. What is the method used for compensation? Is it the same as has been testified to so far in this case?

A. Yes, a share basis.

Q. What do you mean by a share basis?

A. Well, a share basis.

The Court: Don't we understand that? Does he mean something different?

Mr. Andersen: No, your Honor.

The Court: All right.

Mr. Andersen: I assume it may be stipulated, therefore, that everything else would be cumulative along the same line so far as the compensation is concerned?

The Court: On the matter of the share basis, do you want them to ask every witness here how he gets compensated and explain the share basis?

Mr. Rubin: We have no desire whatsoever.

The Court: Then you agree to the stipulation?

Mr. Rubin: Perfectly. [2889]

Mr. Andersen: Then it is stipulated all the fishermen are compensated as has been testified here?

The Court: On a share basis.

Mr. Andersen: On a share basis or lay basis.

Mr. Dixon: And there is a difference in the share depending on whether you are a boat owner or working on the boat.

(Testimony of Forrest R. Smith.)

The Court: I think that goes without saying. We have gone over that several times.

Mr. Andersen: I intend to go into the boat owner's share briefly with this witness, your Honor, but I will handle it briefly. I don't want to waste any more time than the Court does.

The Court: Unless it is something different. If it is just cumulative on the method used of dividing the share of the lay——

Mr. Andersen: This will be something different, your Honor.

The Court: This is a different situation?

Mr. Andersen: Well, no, but we will show by this witness that the boat gets a share also, but it is the share that the boat gets that I want to talk to the witness about.

Mr. Rubin: We will object to that as incompetent and immaterial.

The Court: You mean it is a different share?

Mr. Andersen: No, your Honor.

The Court: Let's move on.

Q. (By Mr. Andersen): When you are out fishing, your boat gets a share, doesn't it?

A. Yes.

Q. Now with respect to the share of the catch——

The Court: By the way, what is the crew on your boat?

The Witness: Oh, from two to four men.

The Court: That is, you and two others?

The Witness: Well, when I say from two to four men, that includes myself.

(Testimony of Forrest R. Smith.)

The Court: That includes yourself?

The Witness: Yes.

The Court: I see.

Q. (By Mr. Andersen): Now with respect to the amount of money which is the boat's share of the catch, which would be a share of the total, that is correct, isn't it?

A. I didn't quite understand it.

Q. What is the boat's share of the catch?

A. An equal share. For instance, if there are three of us on the boat and each man on the boat gets an equal share, and the boat gets an equal share; in other words, if they make a hundred dollars net after all expenses are taken [2891] out for the boat and there is three men on the boat, it is divided four equal ways and the boat gets \$25 and each man gets \$25.

Q. Now with respect to the repairing of the vessel, is the boat's share devoted to that expense?

A. Yes.

* * *

Q. Now with respect to the amount of repair work necessary on the hull of the boat, is the boat's share on an average, that is, the boat's average share of the catch, sufficient to take care of the normal repairs to the hull, motor and gear?

Mr. Dixon: I object to the question, your Honor. I think it is obvious—— [2892]

* * *

The Court: The objection is sustained.

(Testimony of Forrest R. Smith.)

Mr. Andersen: I don't believe this point has ever been argued up until the moment, your Honor.

The Court: I don't think that particular point has been argued, but it is immaterial, counsel.

Mr. Andersen: All right, your Honor.

Q. (By Mr. Andersen): On an average, Mr. Smith, what is the dollar cost per year for repairing your boat, your vessel and gear?

Mr. Dixon: Object to that, your Honor, as being immaterial.

The Court: Objection sustained.

Q. (By Mr. Andersen): With respect to your fishing practices what percentage is fresh and what percentage cannery fish?

A. Since the start of the last war it has been about 90 per cent fresh fish.

Q. 90 per cent what? A. Fresh fish.

Q. And then the rest is for the canneries, is that correct. A. Yes.

Q. Do you have any particular canneries, that is, fresh fish dealers, rather, with whom you do business? A. Yes.

Q. And who are they? [2893]

A. Catalina Fish Company and State Fish Company?

Q. They are down at the dock at Pedro, are they? A. Yes. [2894]

* * *

Q. (By Mr. Andersen): Do you have any understanding with them—

A. I have a verbal agreement, yes.

(Testimony of Forrest R. Smith.)

Q. What is it?

A. Well, the verbal agreement consists that I give them preference to my load of fish when fish are scarce, and when fish is plentiful they will take my surplus.

Q. They will take your surplus? A. Yes.

Q. Are you indebted to either of those markets?

A. At times.

Q. Were you indebted to them prior to the strike or within the year prior to the strike?

A. Yes.

Q. Under what circumstances did you become indebted to them? [2895]

A. I needed money for—to make a net, and I went to Catalina Fish Company and they advanced me the money.

Q. Is that a common practice? A. Yes.

Q. During your operations as a fisherman is it customary and necessary for you from time to time to borrow money in order to maintain yourself and your vessel? A. Yes.

Q. And how often during the past ten years have you found it necessary to borrow money?

Mr. Dixon: I object to that, your Honor.

The Court: Objection sustained.

Q. (By Mr. Andersen): Approximately how much of your time each year is devoted to repair work on your vessel?

Mr. Dixon: Object to that as being immaterial.

The Court: Sustained.

(Testimony of Forrest R. Smith.)

Q. (By Mr. Andersen): Do you fish the full year around? A. No.

Q. Do you follow any particular season?

A. Yes.

Q. What seasons do you follow?

A. I follow the swordfish season during the summer months and the mackerel season in the fall of the year, and [2896] sometimes I fish barracuda and fish——

* * *

A. (Continuing): And fish that run with swordfish during the summer. But I never fish through January, February and March.

The Court: Swordfish, mackerel and barracuda, generally, is that correct?

The Witness: And albacore.

Q. (By Mr. Andersen): Those are the four main fish you catch? A. Yes.

Q. Is there any particular reason why you don't fish through January, February and March?

A. Yes.

Q. What is that?

A. I use that period of the year to repair my hull, my boat in general.

Q. When you come in with a load of fish, will you explain the general practice in disposing of the catch?

A. We come into the dock, the fresh fish dock in San Pedro, and we tie up, and I go to my two favorite markets first. First I find out what the price of the fish is for that day, and then I find out

(Testimony of Forrest R. Smith.)

how much fish they want and need, and then if they don't take the load, take the complete load, why, then I go to the other markets and sell as much [2897] as I can to them. And then if I have any surplus I go back to those two markets and they generally, as a rule, take my surplus fish.

* * *

Q. (By Mr. Andersen): When you come in with a load of fish and sell it to four or five markets as you have indicated, is there any variation in the price you get for your fish?

A. No, never.

* * *

Q. I don't mean a variation from day to day, I mean on a day in any week or any month, on a day is there any variation in the price of fish from one dealer to the next? A. No.

Q. Have you ever had any conversations with the dealers regarding the reason why the price is always the same?

* * *

The Witness: No, I don't believe I have.

Q. (By Mr. Andersen): Have you ever tried to get a higher price for your fish from one dealer than another dealer will pay you?

A. I always try that.

Q. And have you ever had any success?

A. No.

Q. Can you explain any reasons for it? [2899]

* * *

(Testimony of Forrest R. Smith.)

The Court: The form of the question is wrong. Do you have any opinion as to why you get the same price for your fish is the question.

The Witness: Very definitely.

The Court: What is your opinion?

The Witness: My opinion is that the dealers have some method of telling what the other one is paying and they all kind of—my opinion is that they just group together and set the price.

The Court: That is your opinion?

The Witness: Yes.

Mr. Rubin: Now, if your Honor please, we will move to strike that as being self-serving.

The Court: Yes, that is. [2900]

Mr. Andersen: It couldn't be self-serving because, as your Honor has indicated, the dealers aren't a party to this action.

Mr. Rubin: But this witness is a defendant in the case, if your Honor please.

The Court: The motion to strike is denied. It goes to the weight of the testimony. The jury is entitled to receive it and weigh it as an opinion and as an opinion only of the witness, the same as they received all other opinions that have been expressed here from time to time, not only by the fish dealers but by statisticians and experts of one kind or another.

Mr. Rubin: And counsel.

The Court: They will disregard all opinions of counsel.

(Testimony of Forrest R. Smith.)

Q. (By Mr. Andersen): Now with regard to the beginning of a fishing voyage, do you know what price is for the fish that you are going to catch?

Mr. Dixon: If the Court please, I object to the form of the question. This witness can be asked or questioned in a proper form as to what he does, if anything.

The Court: I think so. Objection sustained.

Q. (By Mr. Andersen): Before you go out on a fishing voyage, Mr. Smith, do you endeavor to procure a price for the fish you are about [2901] to catch before you leave on the voyage? Has there been any practice with respect to that?

A. Well, I can explain what I do.

* * *

The Court: That still calls for a yes or no answer. I think the form of the question can be a little bit less [2902] ambiguous.

Before you go out on a fishing voyage do you make any arrangements for the price you are going to get for the fish you catch if you catch any?

The Witness: I try to [2903]

* * *

Q. (By Mr. Andersen): Did you participate in a strike last year? A. Yes.

Q. And before the strike was called were you ever able to procure a definite price for the fish you were about to catch? A. No.

Q. And does your last answer apply to many years of fishing with the exception of the OPA period?

(Testimony of Forrest R. Smith.)

A. The overall picture, yes. There were a few exceptions, but very few.

Q. Do you carry insurance on your boat?

A. No.

Q. Why? A. The cost——

Mr. Rubin: Just a moment, Mr. Smith, please. That is objected to as immaterial.

The Court: Objection sustained.

Q. (By Mr. Andersen): Do you know a man named Di Massa? A. Yes.

Q. Do you remember having a conversation with him? A. When?

Q. On the first day of the strike. A. Yes.

* * *

Q. Were you the captain of the picket line?

A. Yes.

Q. Could you relate the conversation you had with him as you recall it?

A. The ice man, the man that drives the ice truck in San Pedro, that delivers to the markets and myself, went to Mr. Di Massa's market, the L. A. Fish and Oyster, and asked him how much fish he had on hand, how much ice he needed to keep those fish, because we didn't want him to have any loss or spoilage of fish and he could have all the ice he required to keep those fish, and the ice man would deliver it. That was the gist of the conversation.

Q. Did you have any trouble of any kind with Mr. Di Massa? [2905] A. Oh, no.

(Testimony of Forrest R. Smith.)

Q. You got along with him friendly?

A. Very friendly.

Q. Are you friendly with him at the present time? A. Yes.

Q. Do you remember a conversation you had with the witness Castignola? A. Castignola?

* * *

Q. Well, this has to do with a clearance card about Nello Castagnola.

A. Yes, I think I know the boy you mean now. Yes, I did.

Q. Do you recall having a conversation with him?

A. Yes, I believe I did.

Q. This would be on or about June 6th.

A. I am sure now; the boy has the boat called the Flyer. Yes, I had a conversation with him.

Q. At the Union Hall? A. Yes.

Q. What was the conversation as you remember it?

A. On June 6th he come into the Union Hall, I think his brothers were with him, and he requested a clearance card, and the strike committee was there in the room, the union strike committee, and he was told to leave the room and the committee would vote on it. And he did, and the strike committee voted in favor of giving him a clearance card. About five minutes later he had his clearance card and was on his way fishing, as far as I know.

Q. Nothing to stop him from fishing that you knew of? A. No.

(Testimony of Forrest R. Smith.)

Q. Did you get along with him all right?

A. Sure.

Q. Did you have any trouble with him of any kind? [2907]

A. No.

* * *

Q. Do you know a man named Stagnaro?

A. Yes.

* * *

Q. Do you recall having a conversation with him?

A. Yes.

Q. Do you recall the conversation?

A. Yes.

Q. And what was it, in brief?

A. He came to the Union Hall and requested a clearance card, and the same procedure was followed. He was told to leave the room and the Strike Committee voted on it, and he got his clearance card.

Q. There were two other witnesses, Falcone and Bogdonich, do you recall conversations with them?

A. Yes.

* * *

Q. (By Mr. Andersen): Was there any difference with respect to those two men?

A. Not in so far as their request in the Union Hall for a clearance card. [2908]

Q. Did they request clearance cards?

A. Yes.

Q. Were clearance cards granted to them?

A. As far as I know, they were, yes.

(Testimony of Forrest R. Smith.)

Q. With respect to Falcone and Bogdonich, do you know whether they did picket duty or whether their picket duty consisted of repairing their nets at the picket line?

A. I wouldn't know that.

* * *

Q. Do you remember Superintendent Ripley?

A. Yes.

Q. What was your conversation with him?

A. I believe it was the first day of the strike, Mr. Ripley, I believe, is the head of the Railway Express, and he come down there and introduced himself and wanted to know if I was captain of the pickets and I said yes; and he wanted [2909] to know if we would allow the Railway Express trucks through the picket line to deliver fish, the incoming fish, because he said, "I don't want to have it dumped in my lap; I have no way of keeping it. I would appreciate it very much if you would let the trucks go through the picket line."

* * *

A. Let the trucks go through the picket line and deliver the fish. And I said that is perfectly all right. We have no objections.

He said, "Well, can we pick up the fish?"

I said, "I don't think that would be the right thing to do. All we are interested in is not having the fish spoiled. The markets have facilities to take care of the fish and hold them, and we are giving them ice." And that was the gist of that conversation. And after that all the fish that the Railway

(Testimony of Forrest R. Smith.)

Express had in transit—that come to San Pedro, was delivered to the markets, as far as I know.

Q. Did you get along all right with Mr. Ripley?

A. Certainly.

Q. Did you have more than one or just the one conversation?

A. I had a phone conversation with him.

Q. When was the phone conversation?

A. A day or so afterwards.

Q. What was said? [2910]

A. Well, the phone conversation was that Mr. Ripley wanted the union to send him a letter, requested them—well, the letter—I forget what was in the letter now, but, anyway, the letter was to notify the Railway Express Company that there was a strike, and if the union sent that letter to him that would put him in the clear as far as his company was concerned. And the information was transferred over to Mr. Margolis, and he and Mr. Gil Zafran or Jeff Kibre got the letter up and sent it to the Railway Express Company, and I signed it.

Q. Was that the last meeting you had with him?

A. Yes.

Q. Do you remember a conversation with the witness named Gasio?

A. Was he a truck driver?

Q. A truck driver.

A. I believe that is the name of the truck driver that runs the Union Ice truck.

Q. I believe he is the man who said you would dump his fish.

(Testimony of Forrest R. Smith.)

A. That man? I never knew his name at the time.

Q. Do you remember him when he came into court and testified,—did you? A. Yes.

Q. He testified in the record at around page 1554 to [2911] the general effect that you would see that his fish was dumped if he delivered it to another truck after he left there. Do you recall his testimony to that effect? A. Yes.

Q. I say do you recall his testimony saying that?

A. Yes, I recall his testimony.

Q. Did you ever say any words similar to that to him? A. No.

* * *

Q. (By Mr. Andersen): With respect to your fishing, do you ever ice your fish? A. Yes.

Q. You carry the ice in the hold of the boat, do you? A. Yes.

Q. Something like shown in the moving picture?

A. My boat is almost a duplicate of the moving picture boat.

Q. So you carry the ice in the same way?

A. Yes.

Q. Do you put it in with a hose too? Do you?

A. Yes. [2912]

Q. After you carry ice and catch fish, how long can you carry the fish aboard the vessel?

A. That depends on how many fish you catch and how you catch them. That is, in the quantities you catch them. If you catch a large quantity quick, why, you can hold them for four, five days. But

(Testimony of Forrest R. Smith.)

if you catch a small amount for a long time—the most I have ever been able to hold them has been eight days.

Q. When you go out and bring in a good load and just sort of have enough ice to get in,—is that what you do? A. Yes.

Q. You go out to catch as much as you can, and use your ice to the fullest extent, is that correct?

A. That's right.

Q. When you get in, what is the condition of your catch with respect to the time that you are able to keep it after you get in? [2913]

* * *

The Witness: We have to sell it almost immediately when we come in.

* * *

Mr. Andersen: I didn't hear the answer.

The Court: He said he has to sell it immediately because something.

Q. (By Mr. Andersen): Because what?

A. We have used up all our ice.

The Court: You have run out of ice?

The Witness: Run out of ice. And the holds of those boats are so designed that you can't take all the fish out on deck and then put them all in and re-ice them. Your fish would spoil while you were doing it. [2914]

Q. (By Mr. Andersen): Are there storage facilities available to you so that you can store them some place else?

* * *

(Testimony of Forrest R. Smith.)

The Witness: No.

Q. (By Mr. Andersen): Isn't the Ice Union Company available to you? A. Yes.

Q. Why don't you use the Union Ice Company facilities?

Mr. Dixon: Object to that, your Honor.

The Court: Objection sustained.

* * *

Cross-Examination

By Mr. Dixon:

Q. Now, Mr. Smith, I believe you testified that you have been engaged in the commercial fishing since 1935, is that correct, I mean continuously since that date? A. Yes. [2915]

Q. And some time prior thereto except for the interval of time that you mentioned?

A. Yes.

Q. You own your own boat? A. Yes.

Q. And you decide, do you, when you will go out to fish? A. Well, yes, I do.

Q. And you decide where you will go to fish?

A. Yes.

Q. And you decide when you will come back with whatever fish you have caught, if any, from the trip that you go out on, isn't that a fact?

A. Yes.

Q. And nobody tells you then when to go, where to go or when to come back? That is a fact isn't it?

A. Yes.

(Testimony of Forrest R. Smith.)

Q. Now you were the chairman of the strike committee, were you, of Local 36? A. Yes.

Q. And you were on the picket line, were you not, on May 29, 1946? A. Yes.

Q. Do you recall a conversation had on or about May 29 with Mr. Di Massa and the ice man then on the picket line? [2916] A. Yes.

Q. Did you state to Mr. Di Massa at that time that that was to be the final delivery of ice until the strike was settled?

A. I don't believe I did; no.

Q. Did you state anything comparable to those words in discussing the question of future delivery of ice to the dealers at San Pedro?

A. All we told them in that conversation that I can recollect and remember is the fact that they could get the ice they needed so that they would have no spoilage of fish, and I don't think the conversation went beyond that.

Q. You mean whatever fish they then had on hand they could get enough ice from the Union Ice Company to take care of that, is that what you want the jury to understand was the conversation?

A. Yes. [2917]

* * *

Q. I believe you were present, were you not, when a discussion was had with Mr. Castignola about a clearance card? A. Yes.

Q. And also Mr. Stagnaro? A. Yes.

Q. Are either of those two men to your knowledge members of Local 36?

(Testimony of Forrest R. Smith.)

A. I know Mr. Stagnaro isn't. Whether the Castignola boys are or not, I don't know.

Q. Then to the best of your knowledge at least as far as one is concerned he was not a member of Local 36 at that time? A. That is right.

Q. Did you have a conversation with him about getting a clearance card? A. Yes.

Q. And did you have a conversation with him about doing picket duty to get that clearance card?

A. No.

Q. What was the requirement, if any, to get this clearance card? [2918]

A. Well, that was handled by the strike committee as a whole.

Q. Did you refer these two men, Castignola and Stagnaro, to the strike committee to get a card?

A. I was chairman of the strike committee.

Q. Well, then, are you the one that determined whether they got or didn't get a clearance card?

A. No.

The Court: Who else was on the committee?

The Witness: Oh, there was about a dozen other men.

The Court: You mean all met at once or three at a time?

The Witness: No, they were all there at one time. In other words, I had your position. I was running the strike committee. I had no vote. All the rest of them voted, but I didn't. You understand what I mean?

(Testimony of Forrest R. Smith.)

The Court: I understand what you mean.

* * *

Q. (By Mr. Dixon): It is a fact, is it not, Mr. Smith, that in order to get a clearance card a non-member was requested to, and required to, perform a picket duty, is that not a fact?

* * *

A. That was the general policy of the strike committee; yes.

Q. And it is a fact also, is it not, Mr. Smith, that once the picket duty had been performed by non-member and [2920] a clearance card issued so that the fisherman went out to fish, that he was also told where any fish caught could be sold, was he not?

A. I think that they were informed that they could sell their fish any place except the markets that we had picketed. I believe that was the way it was done.

Q. And you were picketing all of the dealers who had not signed this contract, Exhibit 3 that has been referred to before during the trial, were you not?

A. As far as I know anything about the picket line, we were picketing the San Pedro markets.

Q. Now did you have any conversations with Mr. Bogdonich and Mr. Chigi and Mr. Guglielmo about getting clearance cards?

A. I don't remember any of the names after Chigi. I don't know the boys by their names.

(Testimony of Forrest R. Smith.)

Q. Do you know whether those men were members of your Local 36?

A. Oh, I wouldn't know that.

Q. And that was immaterial, I believe, was it, so far as getting a clearance card was concerned?

A. Yes, we just at the outset asked them for their cooperation.

Q. You are acquainted, are you not, with Mr. Ripley?

A. Yes, sir. [2921]

Q. And you had a conversation with him, did you not, at the time the strike first started about trucks of the Railway Express Company crossing the picket line set up by Local 36 against the dealers?

A. Yes.

Q. And the subject of that conversation with Mr. Ripley was to the effect that you did not want their trucks to cross your picket lines, was it not?

A. We asked Mr. Ripley for his cooperation in not sending his trucks across the picket line. He was told we couldn't stop him but we asked him to cooperate with us, and he did very willingly.

Q. You told him you didn't want their trucks to cross your picket line, did you? [2922]

* * *

The Witness: I just previously stated that we asked his cooperation. We told him that we couldn't stop his trucks from going across but we asked his cooperation, his personal cooperation, in not sending these trucks through the picket line, and he willingly cooperated.

(Testimony of Forrest R. Smith.)

Q. (By Mr. Dixon): And did you have any conversation with Mr. Ripley to the effect that you would not permit Railway Express Company to pick up outbound shipments from those shipments at the San Pedro dock?

A. The same thing happened there. We asked him, he said, having the trucks go in why can't we pick up the other shipments going out, and we said we rather you wouldn't, and he said okay.

Q. Were you present at the time the conversation took place between Mr. Gasio and some of the pickets, Mr. Smith? A. Mr. Gasio?

The Court: He was the truck driver on the witness stand there.

The Witness: Oh, yes, I was there. I had the conversation with him.

Q. (By Mr. Dixon): You were the one who had the conversation with Mr. Gasio?

A. Yes.

Q. And at that time was Mr. Gasio at the San Pedro landside of the dealers' place of business, do you recall, with a truck?

A. With a truck, yes.

Q. He had a load of fish, did he, for delivery to one of the dealers at that time?

A. I think so. I didn't actually see the fish, but I think he did. [2924]

* * *

Q. (By Mr. Dixon): Did you have any conversation with Mr. Gasio about delivering that truck load of fish to the dealer at San Pedro?

(Testimony of Forrest R. Smith.)

A. Yes.

Q. What did you say to Mr. Gasio about making the delivery?

A. Mr. Gasio drove his truck up as far as the picket line and got out and wanted to know what the score was. We briefly explained to him we was on strike and had a picket line, and we would like his co-operation in not going through the picket line; that we couldn't stop him if he wanted to go through, but we wouldn't like him to.

He said, "Can I walk through and talk to the market?" And we said, "Certainly, go ahead."

So he was in there for quite some time and he come out and he got in his truck and drove away.

Q. Did you have any conversation with him after he went to the dealer at the wharf about not permitting the delivery of this fish to the dealer's truck outside of the picket line?

A. No, I did not.

Q. Did you have any conversation with him at all when he came out of the fish dealer's office?

A. Not to my memory, I didn't.

Q. That is, you say you don't now recall any conversation with him at all? [2925]

A. No, I am sure I didn't have any conversation with him when he come out. At the time that he come out——

Q. Do you recall telling him that if a transfer was made of the fish from his truck to another truck out on the highway, that he would be followed?

A. I did not.

(Testimony of Forrest R. Smith.)

Q. Did you tell Mr. Gasio that if that transfer took place or was attempted that, quote, "You would have somebody follow up and destroy the fish or knock it off the truck"? A. I did not.

Q. You say you didn't have any conversation of that kind with him, is that a fact? [2926]

* * *

A. No.

* * *

GEORGE IVANKOVICH,

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Margolis:

Q. Mr. Ivankovich, are you connected with the Fishermen's Union? A. I am.

Q. And how long have you been connected with that union? A. Since 1943.

Q. Were you connected with the union prior to 1943? A. No. 1933, I should say.

Q. What position?

A. Secretary of the union.

Q. What local? A. 1933. Local 33.

Q. Local 33 is now the local which has among its members the fishermen on the purse seine vessels, is that right? A. That's right. [2927]

Q. Was there a time when that local had within its members fishermen working on small boats?

A. Yes, there was.

(Testimony of George Ivankovich.)

Q. And when was that?

A. I believe it was '36, '37.

Q. Before that too? A. Around '35.

Q. All right. Have your activities in connection with the union been in San Pedro during the years that you have mentioned? A. Yes.

Q. Have they been confined to San Pedro, or have you dealt with areas outside of San Pedro?

A. They have been confined to San Pedro.

Q. Are you familiar with the situation with regard to the price at which fresh market fish were selling, say back in the years 1934, 1935?

Mr. Dixon: Object to that, your Honor, as being wholly immaterial.

The Court: Objection sustained.

Mr. Margolis: It is preliminary, your Honor.

The Court: I can't see how it could possibly be material. Objection sustained.

Q. (By Mr. Margolis): Are you familiar with the first attempts to negotiate an agreement covering fresh market fish [2928] in the San Pedro area and in other ports in Southern California?

* * *

A. Yes, I am.

The Court: When was the first?

The Witness: Every year since I remember; since 1933 until 1937, '38, '40 and so on.

Q. (By Mr. Margolis): Do you recall particularly the negotiations in 1936 and 1937 with regard to fresh market fish?

Mr. Rubin: Just a moment. Objected to——

The Witness: Yes.

(Testimony of George Ivankovich.)

Mr. Rubin: —as immaterial, and we submit this entire line of questioning is immaterial. He is employed by Local 33, not the defendant in this case, and testifying to matters that are completely without the issues of this indictment.

Mr. Margolis: Local 33 at that time represented the small boats. [2929]

Mr. Rubin: Local 33 at that time had small boats. There is no testimony——

The Court: I remember; I remember. Let me see these documents that you were laying a foundation for or getting ready to.

(The documents referred to were passed to the court.)

The Court: The objection is sustained.

Mr. Margolis: I just want to say this, your Honor: that there has been some evidence with regard to negotiations, and this would just round that out.

The Court: The objection is sustained, counsel.

Mr. Margolis: Very well. That is the only purpose for which we called this witness.

The Court: Is that all?

Mr. Margolis: That is all I am going to ask him under the circumstances, your Honor.

Mr. Dixon: No cross.

The Court: The jury may disregard the remarks of counsel. You have been in court long enough to know that when the judge has ruled, that is the end of it.

Mr. Margolis: I meant, your Honor, that I intended to comply with your Honor's ruling. [2930]

* * *

(The jury was excused and the following proceedings were had in the absence of the jury.)

OFFERS OF PROOF

Mr. Margolis: Shall I proceed with my offer of proof?

The Court: Yes, if you will, please.

(Whereupon an offer of proof was made by Mr. Margolis and ruled upon by the court, which was reported but not transcribed.)

(Also, Defendants' Exhibit CC-1 through CC-9 were marked for identification.) [2931]

* * *

(Reporter's Note: The following proceedings are to be inserted at page 2931 in lieu of the parenthetical note at lines 13 to 17, as follows:)

Mr. Margolis: We offer to prove that if the witness Clifford Kennison had been permitted to answer appropriate questions he would have testified as follows: That in his first year of fishing from 1939 to 1940 his earnings were approximately——

* * *

Mr. Margolis: ——\$700. That since that time he has averaged about \$1500 a year. That the maximum amount that he has earned all together from all sources in any year since that time was slightly under \$2800, of which a little less than \$2400 was

for fishing, and about \$400 from other laboring employment concerning which he testified.

The Court: Casual employment I think he referred to it.

Mr. Margolis: Similarly, if the witness Forrest R. Smith were permitted to answer appropriate questions he would testify as follows: That he has earned, since he started fishing in [2931-a] 1935, from both his share as a working fisherman and his share as the owner of a boat, from a minimum of \$800 to a maximum of about \$5,000; that he has averaged slightly less than \$2500 per year; that in 1946, which was the year in which he had his highest earnings as a fisherman in all of the time he has fished, he earned somewhat less than \$4,000, around \$3800 or so, for his share as a fisherman, and something less than \$1500, about \$1300 or \$1400 from the boat share. That during the year 1946 he spent about eight months fishing, about eight months working at fishing, and he spent about four months working at repairing the boat; that the members of the crew who worked along with him spent perhaps a week or two, not more than two weeks, repairing the boat, but also spent eight months fishing, and that they earned the same amount——

The Court: That is two weeks without compensation?

Mr. Margolis: Working on his boat, that they earned all together——

The Court: I mean for the two weeks they didn't get paid?

Mr. Margolis: They didn't get any extra compensation. That they earned all together the same amount as he earned for his share as a fisherman, to-wit, somewhere in the neighborhood of \$3800. That the \$1300 or \$1400 which was his boat's share was the total compensation which he received [2931-b] for the boat and for all of the work that he did on the boat over a period of approximately four months, and represented at least three and a half months more work than the members of his crew. That if he had taken the boat to a contractor to have the same work done in repairing the boat that he did during the four-month period, that it would have cost him considerably in excess of \$1500 to have that same work done. That if the boat share were credited to his time worked while repairing the boat, his earnings would have been less per day and per week and per month during that period than his earnings for the other eight months per day, per week, and per month working as a fisherman.

Mr. Sawyer, if he would have been permitted to answer appropriate questions, he would have testified that during the time that he owned and operated his boat he never made any money, and that he just about broke even on the boat and received nothing for his labor; that after he sold his boat he went fishing for two and a half months on a share basis on another boat in which he had no interest at all, fishing albacore, and during those two and a half months earned approximately \$600.

I am now going into the Ivankovich offer. Does your Honor want to rule on this first?

The Court: The offer of proof is denied on the grounds indicated in the course of the examination of the witnesses [2931-c] by the objections to the questions by the government relating to the same matters.

Mr. Margolis: I understand that is immateriality?

The Court: Immateriality.

Mr. Margolis: I would like to have those documents marked for identification now.

The Court: Very well. Mark them all with one number and the clerk can arrange them consecutively.

The Clerk: CC, DD——

The Court: No. CC-1, -2, -3, -4, -5, -6 and so on.

The Clerk: CC-1 is the agreement.

The Court: The remainder are letters?

Mr. Margolis: The remainder are letters, and you might read the date.

The Clerk: CC-2 is a letter dated February 15, 1937; CC-3, letter dated February 19, 1937; CC-4, letter dated May 12, 1937; CC-5, minutes of Market Fishermen's Division Meeting, San Pedro, California, Carpenter's Hall, May 23, 1937; CC-6, minutes of Market Fishermen's Division Meeting at Carpenter's Hall, June 4, Sunday, August 31, 1937; CC-7, special meeting, San Pedro Market Fishermen's Division, August 29, 1937; CC-8, minutes of San Pedro Fishermen's Division Meeting, Sunday, September 12, 1937; CC-9 is a letter dated September 17, 1937.

Mr. Margolis: We offer to prove through the witness [2931-d] George Ivankovich, if we were permitted to ask appropriate questions and he were allowed to answer them, the following: That in the years 1934, 1935, and, to some extent in later years, but particularly during those years, fish often sold for so low a price that the fishermen acting through him used to call the charities, and in order to comply with the law and not destroy their fish, rather than sell them at the low price that was offered they gave their fish away to the charities. That this was not an infrequent occurrence, but was something that was quite regular. That in 1936 and '37 there were considerable negotiations in the Los Angeles area with the San Pedro wharfside dealers concerning an agreement for the price of fresh fish. The document CC-1 is an agreement which was proposed locally to the San Pedro dealers, as well as in other ports, and which was entered into in the San Diego area, but the identical agreement was not entered into in the San Pedro area, although negotiations were carried on concerning this agreement which was, as far as the San Pedro area is concerned, a proposal by the union to the market dealers.

That the document CC-2 is a letter which was received by the witness in his capacity as secretary of Deep Sea and Purse Seine Fishermen's Union, which was the name by which the union was known at that time, from the San Pedro Fish Exchange. That the San Pedro Fish Exchange is the same organization which has previously been re-

ferred to in this testimony [2931-e] and in connection with which certain cease and desist orders were entered as previously testified.

That pursuant to the request for negotiations, negotiations actually were carried on, but never did result in an agreement.

That the letter CC-3 dated February 19, 1937, is also a letter which he received from the San Pedro——

The Court: Perhaps you can shorten your offer by simply stating that you offer to prove that all of those documents are what they purport to be, were executed on or about the date they bear, and were made pursuant to what their contents purport to relate?

Mr. Margolis: With regard to the letters, if I could only add that they were in each case mailed to and received by the addressee.

The Court: They purport to be mailed to him.

Mr. Margolis: It doesn't show on the face of the document, but we would show that they were mailed to and received by the addressee in each case.

The Court: In other words, that everything transpired which the relate and purport to have transpired?

Mr. Margolis: That pursuant to the statements made in CC-3 with regard to the appointment of a man to meet with the committee at the market to fix prices to be paid fishermen for their fish and to weigh all boxes and fish on the wharf [2931-f] or in the market as you see fit—I am quoting from the

letter there—that is the end of the quotation, the union did appoint such a man who for a period of several months, four or five months, did act on the pier at first trying to negotiate for the individual catches of the fishermen for the purpose of getting the best possible price for each fisherman; that that practice went on for only several weeks because of the fact that this individual appointed by the union to negotiate in each case was offered uniform prices at any given time or at each different time by all of the dealers, and at no time was able to negotiate any different price with any dealer than the first offer that was made to him at that given time; therefore the negotiation part of the procedure, negotiation for prices, was attempted only for a period of several weeks, two or three weeks, and thereafter was not even attempted, but that for several months the man did remain on the wharf and did participate in the process of weighing the fish as it came in.

With regard to CC-5, they are a set of minutes of May 23, 1937 and show the action that was taken at the meeting at that time.

Similarly with regard to CC-6 and CC-7 and CC-8.

The Court: Very well. The offer of proof is refused on the ground of immateriality and remoteness. [2931-g]

* * *

TRANSCRIPT OF TESTIMONY

(Resumed)

The Court: Just a moment. I want to look at yesterday's transcript.

Mr. Andersen: Page what?

The Court: 2900 and 2901. The question that you were asking the witness Smith to express his opinion as to why he always got the same price for his fish, which I permitted, and denied the motion to strike; I have been wondering if I did not make a mistake in respect to that, not only on the ground that it was self-serving, but because it is immaterial.

Originally I permitted some testimony on cross-examination by the witness Ross, and some of the other witnesses on cross-examination by the defendants as to an alleged or asserted combination for violation of the Federal Trade Commission Act, and it was in that connection, as I recall, that the testimony got into the record. I have indicated since, in sustaining objections to offers of testimony [2934] by the defendants, that it is immaterial whether or not the dealers are or are not in a combine of any kind, or do or do not agree among themselves as to the price they will pay for fish. If that is so, that is not a defense to the action here. So I was inclined to think that I made a mistake.

Do you wish to have recourse to the record?

Mr. Dixon: If it please the court, that was the thought we had in mind in making the objection, that it was immaterial at this time.

The Court: I know that. I got to thinking the matter over in connection with the evidence that went into the record in that respect, and where the government has offered evidence—except preliminarily at the very beginning of the trial as to the nature of the fish business—I have declined it or the government hasn't offered it.

Mr. Rubin: At this time, if your Honor please, we renew our motion to strike the evidence of Mr. Smith in that respect in accordance—pursuant to the matter contained in the record as indicated by your Honor, on the ground that it is immaterial and does not tend to prove or disprove any of the issues in this case. We feel, also, that a ruling at this time will be helpful because it would simply obviate additional objections and re-argument as to possible subsequent witnesses. [2935]

Mr. Andersen: We think that this line of testimony is admissible. We also think that an expansion of that same line of testimony would also be admissible.

The Court: On any other legal grounds than those you have heretofore advanced?

Mr. Andersen: Yes, on all of those grounds heretofore advanced.

The Court: On any others than those you have advanced?

Mr. Andersen: No. I think they have all been covered.

I don't want to argue it at length, but your Honor knows that the defendants here are accused of being businessmen, independent entrepreneurs, or what-

ever term the Government chooses to call them, and part of the testimony that we have adduced goes to refute that very proposition, to show the circumstances under which they operate.

For instance, the Government yesterday asked if they could fish where they chose and when they chose to fish. We propose to show, for instance, that that is a matter that the fishermen haven't anything to say about at all.

Likewise with respect to the sale of fish, we think that we have the right to show that when these men sell their fish, it has already been brought out there is only one place, or one type of place where they can sell the fish. It has already been gone into on the Government's case, that there have been combinations in the past against the fishermen. We [2936] want to show that they really have no opportunity to be these independent businessmen that the Government claims they are.

We want to show that these men are simply working fishermen who come in and dispose of their products, the fruits of their labor at whatever price these people deem fit to pay. They have no choice in the matter at all.

The Court: I think his opinion is the thing that I am speaking of now, and I do not think that that makes his opinion admissible. Even if your testimony is admissible as to what prices they received, that is a different thing than receiving his opinion as to whether there was a combine or not.

Mr. Rubin: Yes. Now that of course is part of the objection. The principal objection, I think the

guts of the matter, is whether or not the evidence at all is admissible. As your Honor has ruled several times, self-defense is no defense.

The Court: I say it is his opinion, and if that is his opinion, his opinion is that, and even if his opinion were true it would not make any difference if they were in a combine.

The Court: I think that I will strike it.

Mr. Rubin: That is correct.

Mr. Kenny: Before your Honor rules, there is one other thing, I suppose, in which the Court can take judicial notice, and that is that the San Pedro Fish Exchange, which has been [2937] testified to, was the defendant in an antitrust action brought by the Antitrust Division and in which the allegation was that part of their conspiracy was to depress artificially the prices paid to fishermen.

The Court: That was in 1939, is that right?

Mr. Kenny: 1942.

Mr. Rubin: 1942. It was a civil action. That is not the FTC order.

Mr. Kenny: This is new matter. I just ran into it.

Mr. Rubin: That is not material to this case at all.

Mr. Kenny: Let me tell the judge about it, please. It took place in Judge Beaumont's court.

Mr. Rubin: We will give them a copy of the decree.

Mr. Kenny: I think that would be helpful. It will save our subpoenaing it. We would like a copy of the decree and the complaint for the record.

That was in 1942 after the FTC. I don't think that that has been brought out, and we do intend to make that an offer of proof, and if the Government will furnish the decree and the complaint that will be most helpful.

Mr. Dixon: We presume that after that order has been entered into that it is not being complied with? Is there a presumption then raised? From our point of view, your Honor, it is wholly immaterial.

The Court: I think it is immaterial. [2938]

As I endeavored to point out heretofore, the most graphic illustration which came to my mind was a murder case. You can use self-defense. But in this kind of a case you cannot use self-defense. It doesn't make any difference what the other fellow tries to do to you.

Mr. Kenny: We can at least use it to impeach the testimony of Mr. Ross, who was a member of the Fish Exchange.

Mr. Rubin: The Fish Exchange is not a party to this case, if your Honor please, and they are not being tried in this case. The question of the Fish Exchange was brought out by the defendants, not by the Government.

Mr. Kenny: The only thing is, the Government brought out this testimony about the eager fish dealers who greeted the returning fishermen at the wharf and did actively bid for their fish. That just isn't so, and the Government itself has said that they combined as recently as 1942 to depress the prices paid to fishermen. It seems to me that that is impeachment of a very high quality.

Mr. Dixon: The purpose of that is to show the buyer-seller relationship, your Honor. Mr. Kenny has completely misconstrued what that evidence shows and the purpose of it.

The Court: That was offered to be limited only to prove that the fish dealers bought fish.

Mr. Dixon: That is right.

Mr. Rubin: From these parties and that they were not [2939] employees. That is the whole purpose of even the allegation.

The Court: I think it is immaterial whether they are a combine or not, and I shall instruct the jury as they come down here this morning to disregard it.

On the other matter, I would like to see a copy of the complaint and the decree so I can fortify myself when the situation does arise.

Mr. Rubin: We would be very happy to supply one.

The Court: Call the jury down.

(The jury returned to the courtroom at 10:15 o'clock a.m.) [2940]

* * *

The Court: Ladies and gentlemen of the jury, yesterday afternoon when the witness Smith was on the stand, Mr. Andersen asked him something concerning his opinion as to why the fish dealers paid the same price. The question as finally formulated was one which I formulated as follows:

“Do you have any opinion as to why you get the same price for your fish?”

“The Witness: Very definitely.

“The Court: What is your opinion?

“The Witness: My opinion is that the dealers have some method of telling what the other one is paying and they all kind of—my opinion is that they just group together and set the price.”

I denied a motion to strike it and stated to you that it was opinion evidence and was to be received in the record as contra, that is, as against the opinions expressed by the fish dealers. On further reflection, I recall that the testimony in that respect, when it was expressed by the fish dealers, was on cross examination, and, moreover, I am now going to grant the government's motion to strike the testimony of Mr. Smith as to what his opinion was, for the reason that it is completely immaterial not only as to what his opinion was, but [2941] if his opinion were true that the dealers were in some kind of a combination, it is immaterial to this case, because as I have indicated to counsel self-defense is not a defense to this type of an accusation by the government.

* * *

GILBERT ZAFRAN

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Margolis:

Q. Mr. Zafran, what is your occupation?

(Testimony of Gilbert Zafran.)

A. At the present time I am the secretary-treasurer of Local 36.

Q. That is of the defendant Local 36?

A. That's right.

Q. And you yourself are, of course, a defendant in this case, is that right? A. That's right.

Q. Have you in the past been a commercial fisherman? [2942] A. I have.

Q. When did you start fishing commercially?

A. I first started fishing in 1925.

Q. Was that for fresh market fish or for cannerly fish? A. Fresh market fish.

Q. I wonder if you would tell us just generally what the nature of your commercial fishing experience participation in that industry has been since you started in 1925.

A. I started fishing in 1925 with my uncle. We fished barracuda and halibut, that is gill net barracuda and halibut for the fresh markets.

Q. How big a boat did you have?

A. A 45-foot boat.

Q. How many men in the crew?

A. Three-man crew. And I think, as I recall, I fished on that boat for about five months. Following that I went into the other end of the business and worked for the fish dealers. I worked for them for a period of six months or so, and then went out of the fishing industry altogether; came back in again in 1929 and fished on a purse seine at that time, fished sardines out of Monterey.

(Testimony of Gilbert Zafran.)

Q. That is a big boat, is that right?

A. That's right.

Q. How big a boat?

A. That was about a 72-foot boat [2943]

Q. Is that the kind of a boat that the members of which are eligible for membership in Local 33 but not in Local 36?

A. That's right.

Q. All right. Go ahead.

A. I fished the entire season, I believe I was on that boat for a period of nine months, and left that boat and went small boat fishing again in San Pedro. We fished for market fish at that time exclusively.

Q. How large a boat?

A. That was a 45-foot boat.

Q. Three-man crew?

A. No; it was a little larger crew. There was a four-man crew in that instance. We fished three or four different types of fish, so we needed more people. Fished lobsters and various fresh market fish, used nets and hook and line, we used every type of gear that it was possible to employ. I was on that boat for two or three months, I believe, and then quit fresh market fishing.

Q. Have you resumed fresh market fishing since then or any kind of fishing?

A. Periodically since then, but not exclusively for the fresh market.

Q. What was your next fishing experience?

A. My next fishing experience was in 1936, I believe. [2944] I went back into the purse seine

(Testimony of Gilbert Zafran.)

fleet fishing sardines, and I fished purse seine regularly, or I should say continuously for the sardine seasons, which was about six months of the year is what I actually fished, and went into other line of endeavor for six months of the year and fished six months of the year, up until 1939.

Q. In 1939 what did you do then?

A. I became the business agent for Local 33. That is, the local that is now known as 33.

Q. What was it known as then?

A. I believe it was—no, it was the same deal, it was the same thing as it is now. It was prior to '39 that it was the United Fishermen's Union of the Pacific. But at that time it was the same as it is now.

Q. Have you ever owned a boat? A. No.

* * *

Q. (By Mr. Margolis): Have you ever owned any interest in a boat? A. No, I have not.

Q. Then, I assume when you fished, during all of these periods when you fished, you fished on a share basis on a boat owned by somebody else, is that right? A. That's right. [2945]

Q. How long did you remain business agent for Local 33, purse seine boats?

A. Approximately 14 months.

Q. What did you do after that?

A. Then I went back fishing.

Q. Did you continue fishing until you began your present job?

(Testimony of Gilbert Zafran.)

A. I fished the one season. Following my resignation, should I say, as business agent of Local 33 I fished one season, and then I had to quit fishing because of ulcers, I had them pretty badly so I had to go ashore. I didn't do any more fishing since November of 1942.

Q. When did you become secretary of Local 36?

A. I think it was in June of 1945.

Q. Have you occupied that position continuously since June of 1945? A. I have. [2946]

Q. What are your duties and what have been your duties as secretary of the local? Just state them briefly.

A. Primarily it is to take care of, that is, when I first started out it was to take care of, the San Pedro unit and to build that as much as possible.

Q. What do you mean by build it?

A. Well, get additional membership and take care of the membership that we had there, do whatever was necessary to keep a healthy local going. And it developed from that point into taking care of the other units as they developed.

Q. By the other units, you mean the Newport Beach unit?

A. Newport Beach unit, Santa Monica, and so forth.

Q. What kind of activities, however, were undertaken on behalf of the membership? What have you done?

A. Well, the activities were to negotiate if there was any negotiation to take place, to meet with the

(Testimony of Gilbert Zafran.)

dealers whenever it was required, to do everything that was necessary to keep the organization functioning in a proper manner.

Q. Does Local 36 have an office some place?

A. Well, we had squatter's rights, if you want to put it that way.

Q. What do you mean by squatter's rights?

A. Just that. We don't have an office of our own, but we are allowed the privilege of using the office of Local 33. What I mean by that is that we are in the office of Local 33, [2947] none of the equipment belongs to us, we use whatever we can, and the girls that are there of course do whatever work they can for me when they haven't the work for Local 33 to do, which means that I have to do most of the office work myself.

Q. You are a fulltime paid employee of Local 36, are you? A. That's right.

Q. Does Local 36 have a fulltime-paid office girl? A. No.

Q. Do you have any other fulltime-paid employee?

A. Well, *the* have a full-time-paid employee in Santa Monica and one at San Diego and I believe they have an office girl in Newport.

Q. By the way, about how many small boats are there fishing out of the San Pedro harbor?

A. When you say "small boats" do you mean commercial boats solely?

Q. Yes, small commercial boats.

A. I would say around 450.

(Testimony of Gilbert Zafran.)

Q. Would that include Santa Monica, Redondo, or is that just San Pedro?

A. No, that is just San Pedro.

Q. Was that same situation approximately true in 1946, in June or before June 1946?

A. Yes, it was. [2948]

Q. In other words, the number of boats fishing out of San Pedro has remained approximately the same?

A. I would say so; yes.

Q. Now does Local 36 have its members on all of those boats?

A. No.

Q. On about how many boats of the 450 does Local 36 have members?

A. I would say about 175 out of the 450.

Q. Now as to that 175 boats on which Local 36 has members, are those boats manned entirely by members?

A. Unfortunately they are not.

Q. Are you familiar generally with the size of the crews of these small boats fishing out of San Pedro?

A. I would say yes.

Q. I wonder if you could give us a general picture of how they run.

A. When you say "crew" I don't quite understand you. Do you mean the number of men on so many boats and so on down the line?

Q. That is right. For example—maybe we can do it this way—there are 1-man boats, are there not?

A. Yes.

Q. Those that are operated just by one man?

A. That is right. [2949]

Q. How many of those boats would you say there are?

(Testimony of Gilbert Zafran.)

A. I would say there are 25 one-man boats.

The Court: Do they fish fresh fish exclusively?

The Witness: No, no. It is both. They may fish cannery fish or they may bring fresh fish in.

The Court: The 450 boats do cannery fishing too?

The Witness: That is right.

Q. (By Mr. Margolis): Is that 25 one-man boats on which there are CIO members or 25 one-man boats overall?

A. I would say 25 one-man boats on which there are CIO members.

Q. Do you know how many one-man boats there are overall?

A. You might add an equal number.

Q. You are more familiar, are you, with the size of the boats on which there are union members than you are the overall?

A. Definitely, because I service them more or less, or I go aboard them or I contact them more often. Therefore I would have a little more idea as to those particular boats.

Q. Now there are boats that have two men on them?

A. Yes, there are boats with two men on them.

Q. How many of them are there that have union members?

A. I would say around a hundred, a hundred and five. [2950]

(Testimony of Gilbert Zafran.)

Q. There are also boats with crews of three?

A. Yes.

Q. About how many of those boats are there, that is, where there are union members on the boats?

A. About 25 I would say.

Q. And there are also boats with crews running four and five?

A. Yes.

Q. How many boats with union members on are there in that class?

A. About 20.

Q. What is the total number of union members, that is, Local 36 members, in San Pedro?

A. When you say total number do you mean paid-up members?

Q. Paid-up members.

A. Approximately 200.

Q. Was that the situation also in June of 1946 and prior to June?

A. Pretty much so.

Q. Incidentally, your testimony with regard to the size of the boats, would that apply to 1946, including the month of June?

A. Yes, I am quite sure it would.

* * *

Q. Do you know approximately how many of the 450 small boats that you have referred to engage part of their time in catching market fish and how many of them engage all of their time in catching market fish?

* * *

The Witness: I would say the full time fresh market fishermen who fish fresh market fish the year 'round comprise about 20 boats.

(Testimony of Gilbert Zafran.)

Q. (By Mr. Margolis): About 20 out of 450?

A. Yes. And the boats that fish fresh market fish part of the time through the year I would say about 90 in addition to the 20, 90 additional boats come to the fresh market fish throughout the year, that is, during the year they bring fresh market fish in. So that would make about [2953] 110 boats, I would say, that fish fresh market fish some time during the year out of that 450 boats.

Q. And what do the other 340 or so do?

A. They tie them up.

Q. When they do fish, what do they fish for?

A. They fish for cannery fish.

Q. During your experience as a fresh market fisherman, which you have testified as taking place on and off for varied periods over a number of years, and during your experience as an officer of Local 36, have you become familiar with the general custom, general practice, through which fish are disposed of by fishermen at the San Pedro wharf?

A. I have.

Q. Has there been any substantial change in those customs or practices or methods by which fish have been sold during the period that you have been familiar with customs and practices?

* * *

The Court: Did you hear the testimony of the witness Smith yesterday?

The Witness: Yes, I did.

The Court: As to the custom and method of selling fresh fish, and the practice?

The Witness: Yes.

(Testimony of Gilbert Zafran.)

Q. (By Mr. Margolis): Would your testimony be the same? A. Yes, I would say so.

Q. Now during the period that you have been familiar the practice, that is, during the period when you have been fishing fresh market fish and have been an officer, have you observed any kind of a change in that custom or practice?

Mr. Dixon: Objected to as wholly immaterial, your Honor, and cumulative.

The Court: Overruled.

The Witness: The custom, as far as I know, has been about the same right along.

The Court: I would like to say to the jury that a lot of these questions, including the testimony, that you cannot [2955] run this business with a pair of scissors, you cannot make a straight line, so that is bound to have a little variation. So if in your minds you happen to think that I have admitted something or excluded it, you are to disregard it because that responsibility is mine and you are to pay no significance to it.

Q. (By Mr. Margolis): You were present in the court room when the witness, Mr. Rose, testified, were you? A. I was.

Q. You heard his testimony about the presentation on the 20th day of May to him of a contract, a proposed contract by you? A. I did.

Q. Did you on that date or about that date present a contract to him? A. Yes.

(Testimony of Gilbert Zafran.)

Q. And is that contract the contract which is in evidence as Government's Exhibit 3? Have you seen Government's Exhibit 3?

* * *

A. It appears to be it.

Q. Was anyone else present besides yourself and Mr. Ross at the time of that conversation?

A. Yes, there were.

Q. Who else was present?

A. There was Mr. McKittrick, myself, Mr. King, and I believe there was one other party but I am not positive, but I believe there were four of us. Three of them I am sure of. [2957]

Q. All right. Do you recall what was said at that time?

A. With relation to my conversation with Mr. Ross?

Q. That's right.

A. More or less. That is, the general conversation.

Q. Do you recall the substance of it?

A. Yes.

Q. Will you tell us what was said, indicating who said what?

A. Well, when we handed the contract to Mr. Ross his first exclamation, should I say, with reference to it was that the contract appeared to him to be very good, and he went on down the line reading it, and he said, well, he thought that stabilization would help the entire industry and he was for it. Then he suddenly stopped and said, "We can't fix

(Testimony of Gilbert Zafran.)

prices," because they had been indicted, as I understood it, in the past, and they had a life probation——

Q. Is that what he said?

A. Yes, and they had a life probation hanging over them and couldn't fix prices at any time. But so far as the agreement, aside from prices, itself, that he was in agreement with it, and the only reason he could not sign the agreement was because of this price-fixing they had gone into. And then, of course, we went into the business of explaining the whole thing and going through the various clauses as we understood [2958] them to be, and took in the Fishermen's Act, and we took in all the various decisions as I knew them that existed at that time. We had quite a lengthy discussion, I would say for at least a half hour or so, in threshing the entire matter out. And we covered all the issues that either of us could bring up. However, the conversation ended with that, as far as he was concerned he couldn't possibly sign it at that moment because of this agreement—this indictment that they had hanging over their head, and he wasn't going to take any chances. However, he would submit it to his attorney and he would contact us later with reference to the signing of the agreement. And that is where we left.

* * *

Q. (By Mr. Margolis): Do you recall having a subsequent conversation with Mr. Ross a day or two before the strike went into effect?

(Testimony of Gilbert Zafran.)

A. With Mr. Ross personally or with a committee that Mr. Ross was part of?

Q. With Mr. Ross personally.

A. Yes, there was a conversation between myself and Mr. Ross in which he asked that a meeting between the union and the fish dealers——

* * *

A. (Continuing)——take place as soon as possible in order that we may be able to work out whatever disagreement there may have been in relation to the contract, and so forth, so that we can get this thing straightened out and go fishing.

The Court: When was this with relation to the time you left him the contract?

The Witness: This was shortly after that day. Possibly two or three days following that time.

The Court: And with relation to the establishment of the picket line?

The Witness: Well, that was before the establishment of [2961] the picket line.

The Court: All right.

Q. (By Mr. Margolis): Before we get on to that, there is something else I want to direct your attention to. At page 167 of the transcript, Mr. Ross testified that in a conversation with him you stated to him that no fish would be permitted to come in on the seaward side or on the land side after Saturday, June 1st. Do you recall that testimony?

A. I recall the testimony vaguely, yes.

(Testimony of Gilbert Zafran.)

Q. Did you ever have any conversation with Mr. Ross in which the question of fish coming in on the seaward side or on the land side after Saturday, June 1st was the subject?

* * *

A. Yes, I had.

* * *

Q. Was it shortly before the strike?

A. Yes, I would say so.

Q. In the course of that conversation did you make the statement which Mr. Ross ascribed to you?

A. No, I didn't make any such statement as that.

Q. Will you state what you did say?

A. What I did say was that we wanted the agreement put [2962] into effect and felt that it was a just agreement, we felt that it would be satisfactory to all, and I couldn't see any reason of hesistancy on their part, and as far as we were concerned that we were going to do everything we could in order to try to get the agreement put into effect, and if they didn't sign or refused to sign, that ultimately we would—well, how would I say it? We would advertise the fact that—

The Court: Is that what you told him? Not how you would say it now.

Q. (By Mr. Margolis): Did you tell him that?

A. I don't know whether I used that particular term, or whether I said we would picket. But we would advertise the fact that we did not have an

(Testimony of Gilbert Zafran.)

agreement, and that we wanted one. I never said at any time to Mr. Ross that we wouldn't permit any fish to come in on the sides.

* * *

Q. (By Mr. Margolis): Before we went into this subject you had mentioned a conversation with Mr. Ross in which he asked for a meeting between the union and the dealers. When he made that request did you make any response?

A. Yes, I said we would meet with him just as quickly as they wanted, and I believe that a date following our conversation was set. [2964]

Q. A date was agreed upon?

A. Yes, I think we met the following day, as I recall.

Q. Do you recall what day it was that you met?

A. I don't recall the day; however, it was between the 20th and the 29th. It was in there somewhere, possibly three days or four days after the time that we gave out or handed the agreement to Mr. Ross, three or four days following that.

Q. Could it have been May 27th?

A. No, it wasn't May 27th, because we had a meeting prior to that date.

Q. A meeting prior to the meeting of May 27th?

A. Yes.

Q. Where was this meeting held?

A. That was held in the loft of Mr. Ross' place of business. That is, we didn't go into the office; we just went up into the upper loft and we sat around on boxes there and discussed the matter at that time.

(Testimony of Gilbert Zafran.)

Q. His place of business on the wharf, is that right? A. Yes.

Q. Who was present at that time?

A. As I remember there was four or five of us there. I believe Knowlton was there, and I don't know whether Smitty was, however I think he was. Anyhow, there were four or five of the fishermen, including myself, that were present at that meeting.

Q. Who were present of the dealers?

A. On the dealer's side, there was four or five or six of the dealers who were there at that time also. I remember definitely Ross being there, and I can't recall definitely who the others were, but he was the spokesman, that is why I can recall his being there very definitely. However, there were four or five others of the dealers there at that time.

Q. Will you tell us what was said and by whom?

A. Well, the agreement, of course, was the thing that was discussed, and we wanted to know what objection, if any, they may have had with relation to the agreement, and they said they felt they couldn't sign the agreement because of the price situation. They went into that phase of it. And everybody took turns of speaking at one time or another. I think we all chimed in, and the general discussion as to the signing of the agreement went along. As I say, we pointed out the various Acts that we thought were a protection for the fishermen, and they were put into effect because of the situation which existed in the fishing industry, and allowed the fishermen to form an association for

(Testimony of Gilbert Zafran.)

the purpose of bargaining with the dealers, and so forth. It was the same thing over and over again. We hit everything that we could think of trying to work out a satisfactory agreement. But the whole thing that stood in the way was—— [2966]

* * *

Q. (By Mr. Margolis): Tell us what was said.

A. They said that the reason they could not sign the agreement was because they had formed a combine before, and that they were indicted, and that in view of that they couldn't sign this agreement because it was more or less along the same lines. And that is why I say that that was what stood in the way.

Q. Did you have any reply to make to their statement that this agreement which you proposed was more or less along the same lines as the one on which they were indicted?

A. That was the emphatic part of it. We emphatically stated that it had no relation at all with the agreement that they had before; that the combine which they had was among the dealers themselves for the purpose that was altogether different from the agreement which we were proposing. The agreement which we were proposing was one of fishermen getting together to try to set minimum prices with the dealers; whereas in the previous situation that they had been indicted on was where the dealers got together themselves for the purpose of buying fish at a definite price set by them from the fishermen, and a definite price at which they

(Testimony of Gilbert Zafran.)

were selling to the [2967] other people that they sold to, and that is why they were indicted, and that the agreement which we were proposing was definitely different from that arrangement, and we couldn't see any relation between the two, therefore we felt that the agreement we were proposing was proper.

Q. Now what was the conclusion of that meeting? What was the last thing that was said or done at that meeting?

A. The last thing that was said was in view of the fact that none of us present were attorneys and we didn't have a command of the law as we should have, that we would have an agreement shortly following that time with representatives——

Q. An agreement or a meeting?

A. A meeting, we would have a meeting of the two groups with the attorneys present from both sides, and we would further discuss the matter. And that is when the meeting broke up and they were going to contact us just when the meeting could be held.

Q. Was a meeting subsequently held?

A. Yes, there was.

Q. When?

A. That meeting took place on the 27th.

Q. Of May? A. Of May; yes.

Q. Where did that meeting take place?

A. That meeting took place in our office, the union office.

Q. Who was present?

(Testimony of Gilbert Zafran.)

A. Oh, there was Mr. Margolis and myself, were present, and there were three or four other fishermen, and I believe [2969] there were about four or five dealers that came from their side.

Q. Do you remember who any of them were?

A. I think that Mr. Di Massa was present and Mr. Vitalich was present because both of them spoke—well, they led the conversation, Vitalich led the conversation and Di Massa chimed in quite a bit. However, I am not positive of the other two or three. I do think that John Solento was there.

Q. How about Mr. Ross?

A. I can't recall whether Mr. Ross was there or not. However, I think he was. But in view of the fact that Vitalich took the lead and Di Massa chimed in, I can recall those two definitely, but the others are vague in my mind.

Q. Will you tell us what was said by the persons present at that conference?

A. Well, we wanted to find out, that is, I asked Mr. Vitalich why their attorney wasn't present, and I don't recall just the extent of the conversation, but I gathered that for some reason he couldn't be there. However, we were going to go ahead and try to work out the contract, or the arrangement, because of the fact that we did have some legal talent there that might be able to throw some light on the questions which were in doubt thus far. And we went through the same procedure. It was the same old rigamarole except that Mr. Margolis brought out the legal points which stood in the way,

(Testimony of Gilbert Zafran.)

and he [2970] enumerated the various rulings that have been made in any case where the fishermen were involved with the dealers, and of course he was a lot more versed on it than I had been. [2971]

* * *

Q. Had you finished your answer, Mr. Zafran?

A. I just simply wanted to say that Mr. Margolis was better versed on it than I and he brought out all these points a lot clearer than had been in the meetings prior to the one that we were at at that time, and that we brought out all these various points, and still the dealers had the same objection, that they couldn't sign the price-fixing agreement simply because they had an indictment hanging over their heads, and we went on and on about these various laws, and so forth, that were in existence for the behalf of the fishermen, and it wound up with the same deal of no matter how much ground we covered or what we tried to do the dealers said they couldn't sign because they had been indicted before.

Well, that is what was said at that meeting.

Q. Following that meeting on May 27th did you send to the dealers this letter which is in evidence as Government's Exhibit 5?

A. Yes, I did. [2972]

* * *

Q. Directing your attention to the second paragraph, "The purpose of this decision was to expediate matters and get a decision from the Government agencies in reference to the legality of sign-

(Testimony of Gilbert Zafran.)

ing a minimum price agreement," I will ask you whether reading that paragraph refreshes your recollection as to any other matters which were discussed at the May 27th meeting immediately preceding the sending of that letter, Government's Exhibit 5.

A. Yes, it does very definitely.

Q. Will you tell us what it was? [2973]

* * *

The Witness: They said that they had contacted the Government for the purpose of getting a ruling on the legality of the agreement and in view of the fact that the Government was slow moving on these issues that they felt that if we went ahead with the program as we had outlined it, or as we had indicated that we would strike if we didn't get an agreement, that that would more or less hurry the Government agencies into giving us an opinion and that possibly that would bring about a quicker settlement of the whole deal.

Mr. Dixon: Now, if the Court please—is the answer concluded?

The Witness: I was just going to say that that is the [2974] reason that this was sent as it was.

Mr. Dixon: I ask at this time that the jury be instructed that the Government is not authorized to give any private citizen any legal opinion concerning any contract, that the only opinions that the Government or its Attorney General or its representatives can give to any person is a governmental official in an official capacity.

(Testimony of Gilbert Zafran.)

Mr. Margolis: If your Honor please, we assign that as misconduct, and we would like an opportunity, if that is the Government's claim, to put on evidence that the Government does not follow that practice but does give opinions, and particularly in the fishing industry it has given opinions in relation to this very subject matter under discussion.

* * *

The Court: I will deny the motion. If there is any objectionable ground it would seem to me that it is immaterial, but even on that basis I think it is admissible. This is a discussion between these people and the dealers. The dealers. [2975] are not the prosecutors here and at the appropriate time I will and intend to give the jury an instruction that in the prosecution of offenses, if the evidence develops that other people are or have been guilty of the same or similar offenses, that it is no defense to the people who are charged here or on trial at the particular time. [2976]

* * *

Q. (By Mr. Margolis): I believe we had finished the meeting of May the 27th, 1946, Mr. Zafran. Was there a subsequent meeting at which you were present between representatives of the union and the dealers? A. Yes, there was.

* * *

Q. (By Mr. Margolis): Do you recall the date when that next meeting was held?

A. I believe it was June 7th.

(Testimony of Gilbert Zafran.)

Q. Where was that meeting? [2977]

A. That was held in the office of Mr. Ross.

Q. Upstairs?

A. Yes, on the waterfront upstairs above his place of business.

Q. Do you recall who was present at that meeting?

A. Well, there was Mr. Ekdale, Mr. Ross, Vitalich—I can't recall who the other dealers were, but there were four or five dealers there; and Mr. Margolis, myself, and three or four other fishermen were there at that time. [2978]

* * *

Q. (By Mr. Margolis): The question was, so that we don't have to go back, what was said by the various persons at this meeting of June 7th held in Mr. Ross' office.

A. Well, the bulk of the conversation was carried on between Mr. Ekdale and Mr. Margolis in relation to the agreement which was being proposed.

Then, as I stated before, all these issues were covered very definitely, the thing was thrashed out and beat around so much there wasn't anything that was not discussed except at this meeting there was brought out the letter which had been sent to the——

Mr. Rubin: Now, just a moment, if your Honor please. If it is going to be a letter that has been rejected in this case we submit that that should be a matter of offer of proof and not gotten to this jury.

(Testimony of Gilbert Zafran.)

Mr. Margolis: It is a question of what was said there.

The Court: This relates to the letter which I refused to admit in evidence, does it, counsel?

Mr. Margolis: I believe it does, your Honor, but the Government has made certain statements about its practices, and this is part of the conversation that took place.

We are not offering these conversations, your Honor, to prove the truth of any of the statements, we are merely offering to prove what was said or done. On this business of [2981] self-serving, what is done during the course of this sort of a series of acts is generally talking. That is generally what is done.

The Court: What is done is what is said. I will overrule the objection.

Mr. Rubin: May I be heard for one moment?

If your Honor please, the technique of getting this letter through a conversation was precisely the same technique that was used at the time your Honor rejected it.

The Court: On cross-examination.

Mr. Rubin: On cross-examination, and this is their direct case. This isn't our case. We haven't opened up the subject. We have excluded it because we felt it was immaterial, and your Honor has not ruled.

Mr. Margolis: We weren't allowed to go into this meeting on cross because the meeting had not been opened up by the Government.

(Testimony of Gilbert Zafran.)

Mr. Rubin: Precisely, and this is their defense and they are trying to meet some evidence that we haven't put in.

Mr. Margolis: The question is, if there are a series of meetings and the Government proves two or three, can we prove the rest?

The Court: No, that isn't the question at all. The objection will be overruled, and if it is immaterial I will strike it. [2982]

Go ahead. You said except that somebody said something about a letter.

The Witness: It wasn't just something said, there was a great deal of discussion which was had in relation to this. That is why I recall it now. In fact, it had been discussed in the previous meeting, May 27th, but at this time there was a great deal of discussion in relation to the letter which was sent by Assistant Attorney General Berge to the dealers, I believe, in the Alaska case where the operators or the dealers and the fishermen——

Mr. Rubin: Just a moment. The letter is marked for identification. It speaks for itself. We submit it wasn't sent to the dealers in Alaska at all. It has been offered and rejected as immaterial.

The Court: I remember reading that letter. There has been considerable dispute and discussion about it, and the letter is immaterial and the witness' statement concerning the letter is immaterial, and what was said there concerning the letter is immaterial.

(Testimony of Gilbert Zafran.)

Q. (By Mr. Margolis): Let me ask you this: Was this letter exhibited to any of the parties at this meeting? A. I believe it was.

The Court: It is still immaterial.

Mr. Margolis: I would like to again lay my foundation [2983] for my offer of proof, your Honor.

Mr. Rubin: We submit that such an offer should be made out of the presence of the jury.

Mr. Margolis: I am just going to offer the letter. I am not going to tell the jury what is in the letter.

Mr. Rubin: We will stipulate to the foundation, your Honor please, as to the authenticity of the letter.

Mr. Margolis: That isn't the foundation I want.

Q. Was this letter, which is marked Defendants' Exhibit D for identification, the letter which was exhibited to the parties at this meeting of June 7, 1946? A. I believe it was.

Q. And is this the letter that was discussed?

A. Yes.

Q. What was said about this letter?

Mr. Rubin: Now, if your Honor please, same objection.

The Court: Same ruling. It is immaterial.

Mr. Margolis: We would like to renew our offer for the record, your Honor, of Defendants' Exhibit D for identification, and particularly in view of the statement made by Mr. Dixon that the Government never gives advisory opinions.

(Testimony of Gilbert Zafran.)

Mr. Dixon: If the Court please, I rise to ask that the jury be instructed to disregard the last comment of counsel with reference to my remarks.

Mr. Margolis: Mr. Dixon made the remarks in the presence [2984] of the jury. He said the Government never gives advisory opinions. It works both ways.

Mr. Dixon: I understood your Honor did not grant my request.

The Court: I did not grant your request. The jury are instructed to disregard Mr. Dixon's remarks previously made to the jury and Mr. Margolis' remarks, all relating to the subject matter of whether the Government does or does not advise anybody.

I endeavored to straighten the matter out in what I thought would be sufficient in the minds of the jury by stating to them that if anybody is or is not guilty of an offense, or if any evidence points to it or indicates it, that that cannot be used as defensive matter to the charge of a crime because, as I indicated before, this is not like a murder case where you can use self-defense.

Mr. Rubin: If the Court please, for the purpose of the record we will object to the introduction of Exhibit D. I do not believe there is an objection in the record. We object on the ground that it is immaterial.

Mr. Kenny: I don't think this is offered in self-defense. This might be offered on the theory that the District Attorney has provided a weapon to the murderer.

(Testimony of Gilbert Zafran.)

Mr. Dixon: Now, if the Court please, I rise again. I think we have gone into this matter several times before. [2985]

The Court: Yes, I think we have.

Mr. Dixon: And your Honor has ruled it immaterial.

The Court: And it is still immaterial. The objection is sustained.

Q. (By Mr. Margolis): Now, omitting anything with reference to this letter in that conversation, the discussion on the subject of the letter, Defendants' Exhibit D, omitting that entirely, is there anything further that was said at that meeting which you have not yet testified to?

A. Well, except to say that we have gone into all phases of everything that was possible and the attorneys, of course occasionally myself and some of the fishermen, as well as the dealers, would take up some parts of the conversation, and there was a thorough discussion had in relation to all the aspects concerning the agreement and themselves or the indictment which they had had, and the whole picture was thrashed out very, very definitely.

Q. Now were you present at a meeting in Mr. Ross' office on June 10, 1946?

Mr. Rubin: May this be subject to the same objection and same motion to strike, if your Honor please?

The Court: Yes.

(Testimony of Gilbert Zafran.)

Q. (By Mr. Margolis): At which Mr. Kibre and several other fishermen were [2986] present?

A. Yes.

Q. And Mr. Ekdale, Mr. Ross, Mr. Vitalich and other dealers were there, is that right?

A. Yes, they were.

Q. Now for the purpose of trying to shorten this—this may be technically incorrect, so I will rephrase my question, but I just want to shorten it—did you hear Mr. Kibre's testimony with regard to what occurred? A. Yes, I did.

Q. At this meeting of June 10th? A. Yes.

Q. If I were to ask you the same questions with regard to what was said and done at that meeting of June 10, 1946, would your testimony be substantially the same? A. Yes.

Q. Were you also present at a meeting of June 11, the next day, in Mr. Ekdale's office in San Pedro at which were present, in addition, Mr. Ross, Mr. Ekdale, Mr. Margolis, Mr. Kibre, and perhaps one or two others? A. Yes, I was.

Q. And were you present in the courtroom when Mr. Kibre testified about what happened at that meeting, the conversation, the dictation of the letters, and so forth? A. I did. [2987]

Q. If you were asked the same questions as Mr. Kibre was asked about what was said and what was done at that meeting would your testimony be substantially the same? A. It would. [2988]

Q. Did you present a contract similar to Government's Exhibit 3, which you identified this morning, to Mr. Vitalich? A. Yes.

(Testimony of Gilbert Zafran.)

Q. And was that on the same day that the contract was presented to Mr. Ross?

A. Yes, it was.

Q. Who was present? The same people as in the case of Mr. Ross, except that Mr. Vitalich was there instead of Mr. Ross? A. That's right.

Q. Do you recall what the conversation was at that time?

A. Yes. The conversation was along the same lines as carried on with Mr. Ross, for the exception that we didn't go into the matter as extensively as we had with Mr. Ross. However, we talked there about 10 minutes regarding the contract and the various phases of it, and so forth. And it was more or less the same procedure followed.

Q. Did the conversation last more than just a minute or two?

A. I would say between five and ten minutes, anyway. There was more than one or two words said.

Q. Do you recall the testimony of Mr. Hamilton in this court room—— [2989]

* * *

A. Yes, sir.

Q. ——to the effect that he had certain conversations with you concerning joining the union in 1946? Did you have such conversations with Mr. Hamilton?

A. I talked to Mr. Hamilton with relation to joining the union on three or four occasions.

Q. All right. When was the first time?

(Testimony of Gilbert Zafran.)

A. I don't recall just when the first time was, but I would say that it was in the early part of 1946 when I went aboard the boat that he was fishing on with Mr. Tufts and a couple of other boys, and we discussed the matter of joining the union very thoroughly. We went into all phases of it. I tried to explain the benefits of an organization, and so forth. And on the other occasions that I had occasion to talk with him along those lines, more or less the same pattern was followed, trying to show the benefit of the union and how we should all hang together, and so forth and so on. It was just a matter of trying to sell him the idea of the benefits of an organization such as ours.

Q. Did he join the union the first time you talked to him? A. No, he did not.

Q. Did he at any time join the union?

A. Yes, he did.

Q. When did he join and will you state the circumstances, [2990] if you know?

A. He joined the union during the period of the strike. However, no one, that is, not myself or anyone that I knew of, confronted him with joining the organization during that time or shortly prior to that. The circumstances under which he came to join the organization was, as I understood it, that he and Mr. Tufts and all his crew came to the office and said, "We want to join the organization." So in view of the fact that we had contacted all of them before, we certainly weren't going to say no at this time. And they joined the union.

(Testimony of Gilbert Zafran.)

Q. Did you contact them about joining the union during the strike?

A. No, sir, I did not.

Q. Did you at any time tell Mr. Hamilton that he would have to join the union in order to go fishing?

A. I never said any such a thing, because the facts speak for themselves. He was fishing after I talked to him three or four times about joining the union.

Q. Did you during the strike tell him that he had to join the union?

* * *

The Witness: No.

Q. (By Mr. Margolis): Did you ever tell that to anybody? A. No. [2991]

Q. Did Mr. Hamilton fish during the strike at a time when he was not a member of the union?

A. I can't say whether he did or not at that time, because it was shortly after the strike had been under way that they did come in and join. Whether he fished prior to that time I can't say.

Q. Mr. Zafran, Government's Exhibit 27 in evidence is a letter dated May 18, 1946 addressed to George Castagnola Fish Company, Santa Barbara, California, purporting to bear your signature. That is your signature, isn't it? A. Yes.

* * *

Q. (By Mr. Margolis): I want to direct your attention particularly to one sentence of that letter: "The fishermen are determined that prewar condi-

(Testimony of Gilbert Zafran.)

tions will not return and insist upon a stabilization agreement for all of Southern California." What prewar conditions did you have reference to in that letter?

Mr. Rubin: If your Honor please, that is objected to as varying the terms of a written instrument. The document speaks for itself, and we submit this witness is not entitled to explain away these writings. They are admissions against [2992] interest.

The Court: The objection is sustained.

Mr. Margolis: We don't want to explain them away.

The Court: The objection is sustained.

Mr. Margolis: I ask that the jury be instructed to disregard Mr. Rubin's statement that we want to explain away these writings.

Mr. Rubin: It is part of my argument as the basis of the objection.

The Court: Well, you should not argue in the presence of the jury. The objection is sustained, and whatever reason the defendant had to offer is not admissible, and the reason the objection is sustained is because it is a self-serving declaration, it is made to vary the terms of a written agreement, and that portion of Mr. Rubin's objection is good and the rest of it will be disregarded by the jury.

Mr. Margolis: Your Honor, I will submit that the testimony we will offer will not vary this document in the slightest. We stand upon the document.

Mr. Rubin: Then it is immaterial.

(Testimony of Gilbert Zafran.)

The Court: The objection is sustained, and the statement of Mr. Margolis will be disregarded. The evidence is not admissible either from the witness or by statement of counsel.

Mr. Margolis: If your Honor please, with respect to Government's Exhibit 205, which are the minutes of the Joint [2993] Executive Meeting, dated May 25, 1946, the last two paragraphs thereof, which were——

The Court: Excluded?

Mr. Margolis: ——excluded by the offer of the government we would like to offer.

(The document was passed to the court.)

The Court: It may be admitted.

The Clerk: That will be DD.

(The portion of the document referred to was received in evidence and marked Defendants' DD.)

Mr. Margolis: Ladies and gentlemen of the jury, the two paragraphs which have just admitted as Defendants' Exhibit DD, which is a part of Government's Exhibit 205, reads:

“Moved, seconded and carried that we notify our International Office of the condition here and request their financial, moral and economic support.

“Moved, seconded and carried that we request the various CIO state and local councils asking their financial, moral and economic support.”

(Testimony of Gilbert Zafran.)

Q. I will ask you, Mr. Zafran, whether the action that was carried at that meeting was followed through.

Mr. Dixon: We object to it as being wholly immaterial, your Honor.

The Court: I cannot see the materiality of it, counsel. The objection is sustained. [2995]

* * *

Q. (By Mr. Margolis): I want to direct your attention, Mr. Zafran, to the strike committee meeting minutes of May 30, 1946. You were present at that meeting, were you not?

A. I believe I was; yes.

Q. Now that meeting refers to—well, the following appears there—"The attached list of boats will be contacted. Publicity and registration committee to send them a letter to help in the strike. If they do not comply action is to be taken against them. This matter is to be attended to immediately." Was there any discussion at that meeting as to what

A. The only action to be taken that was discussed would be that after these boats had been contacted a number of times and they definitely indicated their unwillingness to aid in the difficulty, that we would put them on the unfair list.

Q. Was an unfair list ever made up?

A. Well, a list was made up. It had been made up quite some time later than May 30th though.

Q. What action, if any, was taken by the union or by yourself or by any other defendants, as far

(Testimony of Gilbert Zafran.)

as you know, with respect to these boats whose names were put on the unfair list or with respect to the fishermen working on said boats?

A. No action was taken. [2996]

Q. It was simply put on an unfair list, is that right?

A. That is right. [2997]

* * *

Q. Mr. Zafran, I would like to direct your attention to Government's Exhibit 201, which is the minutes of the barracuda conference of April 18, 1946. In the minutes there appear certain reports with regard to prices being paid. "Brother Black, Redondo Beach, could get 12 cents if it wasn't for ceiling price. Ceiling price being paid. Gilbert Zafran, San Pedro, ceiling price being paid." That is you made that report, is that right? "Brother Bruce, Newport Beach, same condition, not enough fish coming in to change condition. San Diego, ceiling price being paid off and on. Unstable price condition." Do you recall those reports being made at that barracuda conference?

A. More or less.

Q. Do you recall what period of time was covered by [2998] those reports?

A. A very short period.

Q. What do you mean "very short period"?

A. Well, what was asked is what were the various prices in the various locals, and as each party in that particular port made a report he said the price that was being paid, and certainly we don't

(Testimony of Gilbert Zafran.)

go very far back. It was just that it was the current price, and the current price was the price that was being discussed.

Q. I see.

A. I wouldn't go back more than a week or two at the most.

The Court: By the way, counsel, I don't know whether you will need it in connection with the examination of this witness, but I thought before he got off the stand I should rule, in order that you could guide your examination. As to Exhibit K, the objection is sustained. It is not admitted.

Mr. Margolis: We would like to have that stand as an offer of proof, your Honor.

The Court: Very well. The offer of proof will be denied.

Mr. Margolis: Now, your Honor, with regard to Government's Exhibit 202, we would like to offer the balance of that exhibit which was excluded by the government's offer.

(The document was passed to the court.)

* * *

The Court: Very well. The objection is overruled. The matter is admitted in evidence.

The Clerk: That will be EE.

(The portion of the document referred to was received in evidence and marked Defendants' Exhibit EE.) [3000]

Mr. Margolis: Ladies and gentlemen of the jury, this is a letter dated April 25, 1946, addressed

(Testimony of Gilbert Zafran.)

“Dear Member” and bearing the signature of Gilbert Zafran, secretary and treasurer.

It refers to the barracuda conference of April 18, 1946 and because other portions of the letter have already been read to you I will only read the portions which are now in evidence.

* * *

Mr. Margolis: Ladies and gentlemen of the jury, I am doing this only to save time. The entire letter will be available to you because it is all in evidence now.

(At this point counsel read Defendants' Exhibit DD to the jury.)

Q. (By Mr. Margolis): Now, Mr. Zafran, you were here in the courtroom when Mr. Kibre testified concerning a number of conferences that market dealers had concerning the question of a marketing [3001] program, some of which meetings were attended by representatives of the Fish and Wildlife Service and particularly by Mr. Ralph Russell?

A. I was.

Q. And you heard his testimony with regard to those meetings?

A. I did.

Q. If you were to be asked the same questions as he was asked with regard to those meetings, would your testimony be the same?

A. Yes.

Q. I will also ask you if this paragraph, in which you state, “Towards this end we have had two meetings with the local and Washington representatives of the Fish and Wildlife Service,”

(Testimony of Gilbert Zafran.)

etc., referring to Mr. Ralph Russell, is that a reference to those meetings to which Mr. Kibre has testified?

A. Yes, there was a Ralph Russell and Harry Hinkle of the local office here.

Q. Of the local office of the Fish and Wildlife Service? A. Yes.

Q. You were appointed, were you not, as a member of some sort of a committee in connection with those meetings? A. I was.

Q. What was that committee? [3002]

A. It was a committee set up for the purpose of trying to work out a program of unifying the industry for a marketing program, and Mr. Ralph Russell was there for the purpose of lending aid in whatever manner he could because he carried on these advertising programs or marketing programs in the East in the past and he had a whole scrapbook of all the various advertisements that had been presented in these different cities, which was helpful to the committee and we were about to inaugurate that particular type of program in this area.

Q. Did the committee to which you were appointed have any meetings?

A. The meeting at which the committee was appointed for the purpose of carrying this program out was the last meeting that was held. At that time they appointed members on that committee, and I was appointed or at least elected as a member of that committee. However, the committee after being set up did not meet.

(Testimony of Gilbert Zafran.)

Q. Do you know what happened in connection with that program?

A. Just one of those things. There was no participation by all parties concerned and it just folded up.

Q. Now, Mr. Zafran, I direct your attention to Government's Exhibit 211, which is the minutes of the strike committee meeting of June 1, 1946, and particularly to that [3003] portion of that exhibit referring to the publicity committee and stating "The committee has not known what has been released to papers. Insufficient things to release." Now I want you to state, first of all, what the functions were—I will withdraw that.

Was there a publicity committee which functioned throughout the month of June 1946?

A. Yes, there was. [3004]

Q. All right. And what were the functions of this publicity committee?

A. The functions of the publicity committee were to acquaint the press with whatever was taking place in relation to the dispute.

Q. By "whatever was taking place," You mean the demands of the union, and so forth?

A. The demands of the union or the position of the dealers, and what progress was made with the various meetings of the dealers, and keep the press acquainted with the situation as a whole. We had nothing to hide, and we wanted to let the people know what was going on. That was the purpose of the publicity committee.

(Testimony of Gilbert Zafran.)

Q. (By Mr. Margolis): You are familiar with the clearance cards procedure that was used in San Pedro? A. I am.

Q. Tell us what that procedure consisted of, what were the steps that were taken.

A. The steps concerning the clearance cards was very simple: it was simply that the clearance card was issued for the purpose of indicating that that member had complied with the policy of the organization. And the union set down a certain policy for its members, and the clearance card was merely to indicate that he had followed out that particular policy.

Q. Was that issued just to members, or was it also [3006] issued to non-members?

A. It was not restricted to anyone, except that anyone who wished to follow the policy of the organization was given the same type of indication that he had done so.

Q. What was the procedure in obtaining and issuing these cards?

A. The procedure in obtaining one was simply to come into the union and ask that he wished a clearance. A clearance was given to him, and if he stood picket duty, or whatever the case might be, that card was punched to simply indicate the amount of times that he had stood picket duty, or whatever else had been the case.

Q. If a man was given a clearance card in San Pedro, was the clearance card used in other ports? And if so, for what purpose?

(Testimony of Gilbert Zafran.)

A. It wasn't used in other port except to indicate if someone should ask him—for instance, if he went fishing out of Newport or San Diego, or anywhere else for that matter, if he happened to be asked if he had a clearance card, he would show it. In Newport they wanted to know whether or not he had a clearance card as to whether he had complied with the policy of the organization in San Pedro, and he would just simply show it. Aside from that there was no other use.

Q. Do you know if boats went fishing without clearance cards? [3007]

* * *

The Witness: Yes, I know.

Q. (By Mr. Margolis): Did boats go fishing?

* * *

The Court: Objection overruled.

A. They did.

Q. (By Mr. Margolis): Was any action taken by the union against any of those boats which fished without clearance cards, aside from placing them on the unfair list as you have testified.

* * *

The Witness: The answer is no.

Mr. Margolis: May I have Exhibit 304, Mr. Clerk?

If your Honor please, on this exhibit 304 there was also an omitted portion on page 1, that is, in the offer, and we would like to offer that omitted portion.

* * *

(Testimony of Gilbert Zafran.)

The Clerk: FF.

(The document referred to was marked Defendants' Exhibit FF, and was received in evidence.)

* * *

Mr. Margolis: This is Exhibit 304, a portion of which is now Defendants' Exhibit FF. It is a copy of the minutes of the regular meeting of Fishermen's Union No. 36, dated June 3, 1946, and portions of the minutes have already been read, and I will read you the portions which have been omitted.

(Whereupon counsel retad to the jury from Defendants' Exhibit FF.) [3010]

Q. (By Mr. Margolis): Now, in that same set of minutes dated June 3, 1946, there appears the statement, "Zafran says that he is of the opinion that any fisherman now declared unfair, we are in a good position to stop unfair albacore fishermen." Does that represent everything that you said on that subject?

* * *

A. I think I recall the meeting now. Just reading the head of the minutes recalls it to my mind.

* * *

Q. (By Mr. Margolis): You attended a meeting at Newport, is that right? A. Yes.

Q. Now my question was whether that paragraph that I read to you—do you have it in mind, the one I read to you? A. Yes.

(Testimony of Gilbert Zafran.)

Q. Whether that represents all that you said or accurately what you said at that meeting.

A. No. it does not represent anything that was said.

Q. Will you tell us what was said on that occasion?

* * *

The Witness: There was a lot of discussion in reference to that particular subject, but what I had said was not simply that we would be in a better position in relation to the unfair boats, but that is the strike had gone along to a point where we did declare boats unfair and actually put it into effect—we hadn't done so and we hadn't contemplated it at that time—but had we declared the boats unfair and put it in effect we then would have been in a better position [3012] to carry it out because the cannery workers were members of an organization and they wouldn't work any fish which was declared unfair, and things along that line.

Local 33 was composed of union people and these of course would support the action, and so forth.

So that definitely rounded the picture out if we did declare the boats unfair, that the other organizations wouldn't take care of the fish handled by unfair boats.

Q. Was any action ever taken by the union to achieve that result? A. No, there was not.

Q. Now on that same exhibit, at the bottom of page 1, there appears, "San Diego was fishing but

(Testimony of Gilbert Zafran.)

on a previous agreement but no minimum price set." Do you recall what was said with regard—I will withdraw that.

Does that represent everything that was said on that subject?

* * *

The Witness: No, it wasn't everything that was said.

Q. (By Mr. Margolis): Will you tell us the substance of what was said on that subject?

A. I think that I was the one that was speaking in this particular instance, and I said that San Diego was fishing on a previous agreement, the previous agreement being that they had agreed with the San Diego dealers that the unions in the area, which are both AFL and CIO in San Diego, would agree or at least set a price in the morning and that that price would prevail throughout the day, and that is what had been going on, and they were fishing on that basis, and I centered around that particular trend of thought.

The Court: That is, that all dealers——

The Witness: In San Diego.

The Court: ——would set the same price?

The Witness: No, not that the dealers would set the price, but the dealers and the union agreed that the union would set the price for the fish for their members that morning.

The Court: The union would set the price of which [3014] everybody would pay?

The Witness: Which all dealers would pay; yes.

(Testimony of Gilbert Zafran.)

Q. (By Mr. Margolis): Was that done by negotiation between the union and the dealers?

A. Yes.

Q. On page 2 of that same exhibit I direct your attention to the following language, "Coleman suggests that we send up a boat to Santa Monica or where needed to help those fishermen dispose of their fish if necessary." Will you state whether or not that was all that was said on that subject?

A. No, that wasn't all that was said.

Q. Will you tell us what was said, the substance of what was said on that subject?

A. The reason Coleman make the recommendation to send a larger boat to Santa Monica to pick up fish there was because——

The Court: You are saying what he said or the reason he said it?

The Witness: That is what he said.

The Court: All right.

The Witness: He said, we should send a boat to Santa Monica to receive fish from the union boats that could not dispose of their fish in that area, and I pointed out that [3015] there was no dispute there, that there was no need for a boat at that time, that everything was going along all right, but should it be necessary to inaugurate that type of service, well that would be something in the future. And that is what was said at that particular time.

Q. (By Mr. Margolis): Was such a service ever inaugurate? A. No. it was not.

(Testimony of Gilbert Zafran.)

Q. Now at the top of page 3, Mr. Zafran, of the same minutes there appears the statement, "We should not allow anyone through our lines no matter what the pretense." Do you remember whether that is an accurate statement or a complete statement of what was said on that subject?

Mr. Rubin: Now, if the Court please, we renew our objection at this time that it is endeavoring to vary the terms of a written instrument.

The Court: No, that objection is not good. Assume you had a written confession of somebody and it was introduced in evidence. He could take the witness stand and say, "I didn't say that," and it would be admissible. Now these were all admitted here as admissions against interest.

Mr. Rubin: If your Honor please, they are admitted, this particular minute is a minute of Newport Beach unit.

The Court: And it is admissible against all defendants as an admission against interest for what they did in the [3016] nature of what you assert to be a conspiracy.

Mr. Rubin: That is correct. It is admissible against them under the laws of conspiracy because they are co-conspirators, but this particular document——

Mr. Margolis: Because they are claimed to be co-conspirators.

Mr. Rubin: Because they are alleged to be co-conspirators, that is correct—but this particular document is neither a confession nor a statement of Mr. Zafran personally.

(Testimony of Gilbert Zafran.)

The Court: It is an admission against interest against all of them, therefore anyone who is present and knows what happened can get up and deny that it happened, that is true, or, if he wishes, he can testify as to it.

Mr. Rubin: This isn't a denial, it is in the nature of an explanation or modification.

The Court: Anyhow, it is admissible.

Q. (By Mr. Margolis): Do you remember the question?

A. I wish you would have it read.

Q. It might be quicker if I rephrased it.

Referring to the language. "We should not allow anyone through our line no matter what the pretense," tell us what was said on that subject.

A. Well, in the first place the wording that we should not allow was not used because we didn't endeavor to stop [3017] anyone other than to ask their cooperation, and what was said on that subject was that anyone who wanted to go through the lines, irrespective of our asking their cooperation not to, that any pretense that they may give to the picket captain should be disregarded and let it go at that. Of course if they went through, that was their business, they went through, but we wouldn't take all and every pretense for going through.

The Court: Are you saying now what was said or are you explaining it?

The Witness: No, that is what was said.

The Court: Who said this?

(Testimony of Gilbert Zafran.)

The Witness: It was said during the course of the discussion.

The Court: Who said it?

The Witness: I don't know exactly who said it, but I know that this is what had been said.

Q. (By Mr. Margolis): Was this discussion participated in by just one person or were there several people?

A. There were several people who participated in the discussion. I remember the discussion because it was of a vital nature, referring to people going through a picket line, and that is how come I more or less remember the discussion from the standpoint of the way I have explained it. [3018]

Q. What was said then was that no permission would be given to go through under any pretense, is that right? A. That is right.

Q. Now during the course of the strike was any boat stopped from getting fuel or supplies?

* * *

The Witness: I know of no boats that were stopped.

Q. (By Mr. Margolis): Were you generally familiar with the situation during the strike?

A. Definitely.

Q. Now Government's Exhibit 214, which is the strike committee minutes of June 4, 1946, there appears a reference to a motion to contact Joe Harris at Union Ice Company, Terminal Island, and he be asked to honor our clearance cards and not to deliver ice to any fresh fish boat who doesn't have one.

(Testimony of Gilbert Zafran.)

I will ask you whether or not any action was taken with regard to carrying out that motion.

A. To my knowledge, no action was taken.

* * *

Q. (By Mr. Margolis): Were you generally in charge of the activities that were being conducted?

* * *

The Witness: Yes.

Q. (By Mr. Margolis): Were you given information by the members of the activities in which they engaged?

A. That's right.

Q. Did you ever hear of any action being taken in connection with this matter?

A. I didn't hear of any.

Q. Do you know of any boat not getting ice on account of any action taken by the union?

A. As I testified before, no.

Q. Mr. Zafran, I want to direct your attention to Defendants' Exhibit W-1, being the letter dated June 28, 1946, [3020] sent to the San Pedro fish dealers, and also to other fish dealers, with regard to the termination of the strike. Do you recall that letter?

* * *

A. Yes.

* * *

Q. (By Mr. Margolis): Following the sending out of this letter, was delivery of fish to San Pedro and Newport dealers who had theretofore been picketed resumed?

A. Yes.

Q. When was that done?

(Testimony of Gilbert Zafran.)

A. The fishing in San Pedro was resumed on July 1st.

Q. When was it resumed in Newport? Well, the delivery of fish in San Pedro was resumed then?

A. The pickets would be taken off as of that date, and fishing could be resumed then. If anyone had fish or went out the night before they could unload fish that morning at the markets.

Q. When were the pickets removed from Newport Beach?

A. It was shortly following that period. I don't know the exact date, but it was a short time following that.

Q. Was any action taken by the union following that with regard to establishing or maintaining any minimum price? A. Yes. [3023]

* * *

Q. (By Mr. Margolis): What was done?

* * *

A. There was a man hired by the union to be at the fish dock at all times to endeavor to maintain a verbal minimum with the dealers. If I might clear that up a little. The contracts which had been in existence had a minimum price. Those contracts which had been signed had a minimum price, and we wanted to establish that particular minimum. The man on the dock was going to endeavor to get that minimum price for our members with the dealers, and that is the action which was taken by us to maintain those minimums.

(Testimony of Gilbert Zafran.)

Q. (By Mr. Margolis): What happened with regard to it?

A. It lasted for a couple of days and it gradually broke down to a point where there was no use of having a man on the dock because——

Mr. Rubin: Just a moment, if your Honor please. The rest of this calls for a conclusion.

The Court: That is a conclusion.

Q. (By Mr. Margolis): The prices were not maintained, is that right?

A. That is right.

The Court: You mean the dealers didn't pay the same prices?

The Witness: I mean they didn't pay the minimums which [3024] our agent asked to be paid to the men——

The Court: You mean all dealers didn't say they would pay the same minimum, is that what you mean?

The Witness: I mean that all dealers did not pay the minimum.

The Court: Different dealers paid different prices?

The Witness: No, sir; they all paid the same, but they didn't pay the minimum.

The Court: They all paid the same but they all paid less?

The Witness: That's right.

The Court: Than this price which you endeavored to establish as a minimum?

The Witness: That's right.

The Court: All right.

(Testimony of Gilbert Zafran.)

Q. (By Mr. Margolis): Mr. Zafran, I want to direct your attention for a moment to Government's Exhibit 208, which is the minutes of the strike committee meeting of Local 36 for May 31, 1946, and particularly the publicity committee report saying, "Letters have been drawn up and will be distributed." Will you state what letters are referred to there, if you know?

A. The letters referred to in that instance are the letters which were going to be distributed to the various boats in the harbor area telling them what—

The Court: Are they in evidence here, counsel?

* * *

Q. (By Mr. Margolis): Were those letters kept? A. I don't think they were kept.

Q. This was something that was distributed around? A. Yes.

Q. You know what it was, however?

A. It was simply stating there was a strike in effect and we desired their co-operation, and words along that line. The committee or the members were going to distribute these letters to the various fellows on the boats so they knew what the score was.

* * *

Q. Now, Mr. Zafran, I want to direct your attention to Government's Exhibit 228, which is the strike membership minutes of Local 36 for June 15, 1946, and particularly to the last item on page 1 of that exhibit: "Question of jurisdiction brought up by members, whether or not members of Local 33 would have to pay fines, etc., or if members who are

(Testimony of Gilbert Zafran.)

fishing cannery fish would make any difference regarding payment of fines and picket duty." Now will you state whether that was all that was said or whether that accurately reflects what was said?

The Court: Were you at the meeting? [3029]

The Witness: Yes, I was definitely at the meeting.

* * *

Mr. Margolis: "Brother Jeff Kibre, International secretary-treasurer, points out that all small boat fishermen are involved whether belonging to another local or fishing for canneries, that at one time or another they will be fishing market fish, that one small boat problem concerns all small boats, that there should be no jurisdictional beef as between locals and types of fish at this time when cooperation is so needed, that fish is fish and a problem of every fisherman. Furthermore points out that the dealers are waiting for albacore to show up thinking that the fishermen will go hog-wild and forget about the strike, that this is exactly what we must prepare for, get a program in motion before we go out for albacore that will carry the strike through to a victorious finish while we are out fishing. This means cooperation from all boat fishermen."

Q. Now in addition to what I have read, was there anything else said on that subject?

A. What was said in addition to that was that the members of the union, all members of the union were involved in this thing, and however some of

(Testimony of Gilbert Zafran.)

them were fishing cannery fish and some were fishing market fish, but irrespective of that that all those members who are members of the union are involved in this thing and we should all work together on this question. I think you have asked another question a while ago about purse seines, didn't you? [3032]

Q. Well, I want to know if anything at all was said as to the whole thing I read. It was broken up into two parts. Whether or not members of Local 33 would have to pay fines, et cetera, was one of the subjects which is mentioned here; my question includes that reference.

A. Well, that is what I wanted to bring out, because I believe you did ask it. This was said about the purse seines. There are a number of purse seine boats, small purse seines, that fish fresh market fish a good portion of the year and at this time——

Q. Are those members of Local 33?

A. They are members of 33. And this particular time of the year they were fishing fresh market fish, so it was pointed out that in view of the fact that this dispute was affecting all fresh market fishermen, irrespective of the fact that they were members of Local 33, that they also should be in the same position as members of Local 36 who were in this thing all the way. That is what we said with reference to the purse seines.

Q. I direct your attention to Government's Exhibit 209, being a letter dated—copy of a letter dated July 9, 1946, addressed to Dear Brother

(Testimony of Gilbert Zafran.)

Hauser, and signed Gilbert Zafran, Secretary, the first paragraph of which reads: "As you have noticed in the minutes of our last central executive board meeting a motion was passed that a letter be sent to all [3033] dealers who have not as yet signed an agreement or agreed to recognize the union as the bargaining agent for the fishermen. I am enclosing a letter which I have drafted up for that purpose and had checked by the attorney for any damaging language." What letter was referred to in that paragraph?

A. That was the letter in which we asked the cooperation of the Santa Barbara dealers on the basis of minimum prices, and we wanted them to go along with the union's policy of minimum prices in the Southern California area.

Q. I think that letter has previously been referred to and has been put in evidence. Do you remember that letter?

A. I believe it has been read to the jury.

Q. All right. But it is the one to the Santa Barbara dealers?

A. Yes.

Mr. Rubin: I believe it is 210. Is this the letter you want, Mr. Margolis?

Q. (By Mr. Margolis): Is this the letter that you referred to? This is Government's Exhibit 210. No; this is the same one.

The Court: Well, let's move on.

* * *

Mr. Margolis: I want to tie it in, your Honor.

Q. (By Mr. Margolis): Is that the letter?

A. Yes, I believe that is it.

(Testimony of Gilbert Zafran.)

Q. There was some testimony about a conversation that you were supposed to have had with a Mr. Naylor, page 1602 and 3 of the transcript; do you recall Mr. Naylor testifying? A. Yes.

Q. Did you have a conversation with Mr. Naylor?

A. Yes, I did. I don't recall the date, but it was shortly after the termination of the strike.

Q. Mr. Naylor is the man from Newport Beach, is he not?

A. It was in relation to the termination of the strike.

Q. Was that a telephone conversation or in person?

A. That was over the telephone.

Q. Will you tell us what was said in that conversation?

A. He asked me if the San Pedro boys were going to go fishing. I said yes they were on the basis of this letter which had been drafted by the two attorneys, that is, the two letters; that on the basis of those letters we were going to go fishing. He said if the Newport dealers—that is, if the picket lines in Newport were going to be removed. I said they would be removed on the same basis as they were here in relation to these letters. [3035]

* * *

Q. Will you look at W-1?

A. (Examining document) This is the letter that I am referring to at this time.

(Testimony of Gilbert Zafran.)

Q. It was shortly after that letter or about the time of the sending of that letter that you had the conversation, is that correct?

A. Yes, I believe so.

Q. Now had you finished—I don't remember whether you had finished your answer about the conversation or not. Had you?

A. Well, no, I hadn't expect that he asked me whether or not we were going to remove the pickets, or what we were going to do with the Newport situation, and I said that would be up to the Newport boys as to what they were going to do down there, as I recall the conversation itself.

Q. Was there anything else said? [3037]

A. Not substantially that I can recall.

* * *

Cross-Examination

By Mr. Dixon:

Q. Mr. Zafran, are you employed by anyone else other than Local 36?

A. I am not.

Q. Have you been employed by anyone else other than Local 36 during the last two or three years while you have been business agent of Local 36?

A. Not since I have been business agent, no.

Q. How long have you been business agent of Local 36?

A. Since June of '45.

Q. June of '45?

A. Yes.

(Testimony of Gilbert Zafran.)

Q. Since that time you have been employed exclusively by Local 36, is that right?

A. That is right.

Q. Prior to that time were you employed by anyone else other than Local 36? A. Yes.

Q. By whom?

A. I was working for the California Marine Curing and Packing Company.

Q. In what capacity? [3038]

A. Warehouse foreman and contact man.

Q. Were you working for Local 36 parttime at that time? A. No.

Q. Were you working for Local 36 in an official capacity at all during that time?

A. Definitely not.

Q. So that your official connection with Local 36 dates from July of 1945, is that correct?

A. That is right.

Q. Now, Mr. Zafran, I believed you testified that you were among those members of the committee from the union that present contract Exhibit 2 to Mr. Ross in the latter part of May 1946, is that correct? A. That is right.

Q. I believe you testified that Mr. Ross told you that he could not and would not sign the contract presented to him because of this indictment that you have described, is that correct?

A. That is right.

* * *

Q. After Mr. Ross had told you that he could not and [3039] would not sign the contract, did you

(Testimony of Gilbert Zafran.)

state to Mr. Ross that "Ways and means would be found to compel us to sign that contract"?

A. I made no such statement.

Q. Did you make any statement to Mr. Ross comparable to that effect?

A. Positively not.

Q. What other conversation with reference to his signing the contract did you have, if any, other than what you have described?

A. The only conversation that we had with relation to the contract was that we try to convey our position to him and show the fairness of the agreement and try to endeavor to get him to see our side of it and decided it on the ground.

Q. Was that after he told you he couldn't and wouldn't sign the contract?

A. We started out before and after.

Q. Now you were also with the committee that presented the contract Exhibit 3 to Mr. Vitalich, were you?

A. That is right.

Q. And do you recall your conversation with Mr. Vitalich at the time you presented the contract to him?

A. Yes.

Q. Did you tell Mr. Vitalich at that time, "Well, read it and sign it; I will pick it up," referring to the contract [3040] Exhibit 3?

A. Not in those words.

Q. Did you have any conversation with him which was substantially to that effect, Mr. Zafran?

A. It wouldn't be substantially to that effect; no.

(Testimony of Gilbert Zafran.)

Q. Now you were on the committee that presented the contract to Mr. Demeglio, were you?

* * *

A. Yes. [3041]

* * *

Q. Mr. Zafran, did you say to Mr. Demeglio at the time you presented him with the contract, "You look it over, look it over and sign it, and then we will pick it up"?

A. Not in those words, we didn't say it.

Q. Now did you tell him anything to that effect?

A. Well, you could construe it as that; yes.

Q. Can you recall the substance of the words that you used at the time you handed the contract to Mr. Demeglio? A. Yes.

Q. Was it different from what I have just stated?

* * *

The Witness: Yes, it is different from the way that you just read it.

Q. (By Mr. Dixon): Can you recall, and will you now state to the jury, what you claim you told Mr. Demeglio at the time you gave him the contract?

A. Yes. We gave him the contract, as we did to all [3042] other dealers, and we discussed it.

Q. I am asking you now what you said to Mr. Demeglio at the time you gave him the contract.

A. That is what I am trying to tell you.

Q. Just tell me that, please.

The Court: Just say what, in substance, was said.

(Testimony of Gilbert Zafran.)

The Witness: We asked Mr. Demeglio, we gave Mr. Demeglio the contract and asked him to look it over, and he started to read it, and we went into the discussion with him, as we had with the other dealers, and he said, "Well, I will have to look this over because I have partners and we will want to check the thing over and we will let you know."

I said, "All right. You look it over and we will be back and pick it up."

Q. (By Mr. Dixon): So that after Mr. Demeglio had looked it over you told him you would be back to pick it up, is that correct?

A. Yes.

Q. And did you mean when you came back to pick it up that you would come back to pick up the signed contract?

A. If it was signed.

Q. Mr. Zafran, you were a member of the committee which passed on clearance cards that you have heard described here many times during the course of this trial, were you?

A. I was not a member of that committee.

Q. Well, as business agent of Local 36 there was a clearance card system that was used during the course of this so-called strike in June of 1946, wasn't there?

A. There was.

Q. And it is a fact, is it not, Mr. Zafran, that non-members of Local 36 secured these clearance cards from the union, isn't it?

A. Yes.

Q. And at the time these cards were secured, can you state whether or not they were granted

(Testimony of Gilbert Zafran.)

unless the person securing the card had done picket duty for the union?

A. The clearance cards were granted, to my knowledge, whether or not he did picket duty.

Q. Do you say that any fisherman, then, could merely get a clearance card from your union by coming in and asking for it and nothing else, is that correct? A. That is not correct. [3044]

Q. Is that a fact?

A. That is not correct.

Q. What other requirements were there for a non-member to get this clearance card to fish?

A. If a non-member came in to get a clearance card, he came in asking for a card; we told him what our position was, what was required of the members of our organization, and if he wishes to comply, that we expected him to do the same, and if he did that, then he would say, "Well, I will picket," "I am going to picket," and he would give the picket captain, or whoever was on the registration committee, the time that he said he would, and a clearance card was issued. Whether or not he picketed was something that was determined later. But he was on or a picket time, and either he showed up or he didn't. That was something that was determined later by the card itself.

Q. Do you know as a fact whether any of these clearance cards were given to any non-members except those who picketed?

A. That I can't say.

Q. Well, you were business agent of the union, were you not?

(Testimony of Gilbert Zafran.)

A. Yes, but I didn't check every picket card.

Q. If there was any such cards that were given to non-members who did not picket, would you know of them?

A. Not at this time, I wouldn't. I wouldn't know at [3045] that time.

Q. You wouldn't know at that time?

A. No.

Q. As far as you know, then, of your own personal knowledge all of the non-members who got clearance cards did picket duty, is that correct?

A. So ar as I know.

Q. After these non-members secured the clearance card were they told by you or anyone in the union, to your knowledge, as to where the fish that they caught could be sold?

A. We didn't tell any of them where the fish could be sold. We told them who had signed the agreement and what our position was.

Q. And you indicated to the non-members who got these clearance cards that the signing dealers were the ones to whom the fish could be sold when caught by the fishermen, is that correct?

A. The signing dealers, as far as we were concerned we were selling our fish to them, yes.

Q. I will hand you what is known as Government's Exhibit 203, already in evidence, and ask you to examine the same and state to the court and the jury whether you sent that letter to the person named as the addressee therein.

A. This appears to be the one I did send.

* * *

(Testimony of Gilbert Zafran.)

Q. (By Mr. Dixon): It is a fact, is it not, Mr. Zafran, as stated in Government's Exhibit 203, that you had already decided on May 17, 1946, that the contract, Exhibit 3, would be presented to each dealer in the Southern California area, and that they would be given 48 hours to sign the contract, and that, quote, "If the contracts are not signed by 7:00 a.m. Wednesday we will establish picket lines and stop all fishing for fresh fish in Southern California," end quote?

* * *

A. No.

Q. (By Mr. Dixon): Do you mean that had not been decided at the time you sent this letter to your president of the International Fisherman & Allied Workers of America on May 17th?

A. That was not definitely decided on May 17th.

The Court: You mean it had not been previously decided?

The Witness: It had not been definitely decided by all that these agreements were going to be sent to everyone. It was a tentative agreement that we had agreed on, but the way it was put here it is a definite decision. The decision was not definite on May 17th. However we did inform the president of the International that this action was going to be taken if such-and-such wasn't done.

But that wasn't a definite decision, and other decisions were made following that which were definite.

* * *

GEORGE KNOWLTON

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Andersen:

Q. Your name is George Knowlton and you are one of the defendants in this case?

A. Yes, sir.

Q. You are a fisherman by trade and occupation, are you? A. Yes, sir.

Q. Will you speak louder so we can all hear you?

A. Yes, sir.

Q. You own a fishing vessel, don't you?

A. Yes, sir.

Q. And is the name of that fishing vessel the America II? A. America No. 2, II, yes.

Mr. Andersen: I assume it may be stipulated that was the fishing vessel that was shown in the motion picture here the other day?

Mr. Rubin: We will be glad to stipulate to that. So stipulated.

Q. (By Mr. Andersen): You are the man who smokes a cigar all the time——

A. Except in court.

Q. ——on the bridge? By the way, to refer again to that fishing vessel briefly, is that a typical fishing trip?

A. For wintertime it is a typical fishing trip.

Q. How long have you been engaged in the fishing industry?

(Testimony of George Knowlton.)

A. Well, I have been engaged since 1919. Continuously since 1922, but I have been in it since 1919.

Q. From 1922 or 1919, whichever date it is, have you been continuously engaged in the fishing industry in this area?

A. Well, except for small, short periods of time, you might say two or three months at a time, yes.

Q. Well, fishing has been your chief occupation?

A. It has been my entire occupation. What I mean by that is I do not always fish around this area. I might fish out of some other locality. [3050]

Q. What other locality do you fish out of?

A. Well, it is according to the type of fishing. It possibly could be any port on the Pacific Coast.

The Court: You mean you have fished out of all ports on the Pacific Coast?

The Witness: Most of the ports on the Pacific Coast.

The Court: Most all of them?

The Witness: Yes.

The Court: You have fished out of other ports, too?

The Witness: Yes.

Q. (By Mr. Andersen): Have you always owned your own boat or have you worked as a boat puller?

A. I have worked as a boat puller.

Q. How long did you work——

The Court: All right. Boat puller. That is a new one on us. What is a boat puller?

(Testimony of George Knowlton.)

The Witness: That is a trade name for a crew member.

The Court: Who does not own his boat?

The Witness: Yes, sir.

The Court: Or any interest in a boat?

The Witness: Yes, sir.

Q. (By Mr. Andersen): How long did you work as a crew member?

A. Well, it was different times. I worked around '22 [3051] and '23 as a crew member, I believe, somewhere in that time. It is such a long time ago it is pretty hard to tell accurately.

* * *

Q. You bought your first boat about what time?

A. About '23, I believe.

Q. And since 1923 have you operated your own boats or have you worked as a crew member?

A. I have done both. I have operated my own boats or have you worked as a crew member?

Q. You bought your first boat in 1922. How long did you operate that boat?

A. I believe two or three years.

Q. Then did you sell it or trade it in on another one?

A. I sold it.

Q. Then did you buy another boat or did you work as a crew member.

A. Another fellow and myself went in partners on a boat.

* * *

(Testimony of George Knowlton.)

Q. From 1922, when you purchased your first vessel, or boat rather, how many of the intervening years have you fished as a crew member rather than boat owner?

A. I would say not more than a total of two years.

Q. The rest of the time as a boat owner?

A. Yes, sir.

Q. Your first vessel, how much did it cost?

A. \$250, approximately.

Q. Then you went in with Charlie Taylor and bought a second boat thereafter?

A. Yes, sir.

Q. What did that vessel cost?

A. I believe it was around \$800.

Q. How long did you fish on that boat?

A. I believe it was about a year and a half.

Q. About that time did you also fish or work as a fishing captain on other vessels?

A. At that time we lost that boat, it was blown up, and we had no more boat so I operated another boat as a fishing captain.

Q. And as a fishing captain in the fresh market fleet or in another fleet?

A. At that time there was no local cannery fish, it was all fresh fish markets. [3053]

Q. How long did you work as a fishing captain?

A. One year.

Q. By the way, that simply means the captain of a fresh fish market boat, isn't that correct?

A. Yes.

Q. How long did you work in that manner?

A. That was one year.

(Testimony of George Knowlton.)

Q. Then you bought another boat, did you?

A. Yes, sir.

Q. And what the size of it?

A. Fifty-four foot boat.

Q. What did it cost?

A. The original cost was \$3,000, that is, that is what I paid for it, was \$3,000.

The Court: A new boat?

The Witness: No, old boat.

Q. (By Mr. Andersen): How long did you use that boat? A. About six years.

Q. What happened to it?

A. Well, I made a down payment of \$1,000 on it and during the six years I operated it and paid an average of \$250 a year on it. At the end of the six years, interest and insurance had accumulated up to \$3,400, so I turned it back to the cannery.

Q. What cannery was that?

A. That was Van Camp cannery.

Q. Then after you turned that vessel back to the cannery did you again work as a fishing captain?

A. For part of a year; I can't tell you exactly how long.

Q. Then you bought another boat, did you?

A. Then I bought another boat.

Q. That was in about 1935 or '36? A. 1936.

Q. What sort of a boat was that?

A. That is the present boat I have, the America II.

Q. What is the usual size of the crew on that boat?

(Testimony of George Knowlton.)

A. It varies according to the season. In winter-time it is generally a 3-man crew; in the summer-time from 5 to 6.

The Court: What is the size of the boat?

The Witness: Forty-five feet.

Q. (By Mr. Andersen): How big is it?

A. Forty-five feet long.

Q. How much did you pay for it?

A. The price was \$2,500.

The Court: When?

The Witness: In 1936. [3055]

Q. (By Mr. Andersen): You bought it in 1935 for \$2,500? A. 1946.

Q. How much do you still owe on it?

Mr. Rubin: That is objected to as immaterial, if your Honor please.

The Court: I do not think it is material, counsel. Objection sustained.

Q. (By Mr. Andersen): With respect to the maintenance of the vessel, I assume that you maintain it in the same general nature that has been heretofore mentioned, is that correct?

A. Yes.

Q. Of course when you fish, this vessel gets a share of the fish in the same manner that has been testified here by other men who own boats?

A. Yes.

Q. There is no difference, is there?

A. No difference. [3056]

* * *

(Testimony of George Knowlton.)

Q. Approximately how many months of the year is the vessel laid up during which time you are repairing it and readying it for fishing voyages?

A. Well, we change different operations so much that I should say between two and three months of the year.

* * *

Q. During that time do you work on the vessel?

A. Yes.

Q. Now with respect to the sale of fish, do you recall these fishing tags? A. Very well.

Q. Those are photostatic copies of them. Every time you deliver fish to a fish market you of course get fish tickets of that general nature, do you?

A. Yes.

Q. And those tickets are the tickets that *are usually* used as the medium through which you are paid, that [3058] *is*, you are paid according to the price shown on the fish tickets, is that correct?

A. That is correct.

Q. Now during the *many that* you have been selling fish to the fish dealers at San Pedro on a day-by-day basis, and regardless of which dealer on the dock there at San Pedro to whom you sell the fish, has there *every* been any variation in the price paid to you for a particular type of fish?

Mr. Rubin: Just a moment. If your Honor please, that is objected to as completely immaterial and was the subject of your Honor's instruction to the jury this morning.

(Testimony of George Knowlton.)

The Court: Yes. We have gone over that before. The objection is sustained.

Q. (By Mr. Andersen): Were you ever on the picket line at a time when Mr. Vitalich, one of the witnesses who testified here earlier, was present?

A. No, I was never on the picket line when Mr. Vitalich was around.

Q. Did you ever have any conversation with him at all at any time when you were on a picket line?

A. I was not on the picket line.

Q. Did you ever have a conversation with him during the period of the strike?

A. I may have. I believe that I was present at one of [3059] the meetings that he was at. That is the only time it could have been.

Q. Did you personally have any conversation with him? A. No, not personally.

The Court: What was his name?

The Witness: Vitalich.

The Court: Didn't you ever sell him any fish?

The Witness: Oh, yes; I have sold him fish.

The Court: When you say you have never had any conversation with him, you mean during the strike?

The Witness: During the strike.

Q. (By Mr. Andersen): Do you know a man named Castagnola?

A. I know several Castagnolas. If you are referring to the one that testified on the stand, yes.

Q. Do you recall having a conversation with Mr. Castaglona?

(Testimony of George Knowlton.)

A. I can remember Mr. Castaglona coming to me and asking my advice on the situation.

Q. Do you recall when that was?

A. Not definitely.

Q. Do you recall any conversation that you had with him and who was present?

A. No. I believe there was some other members of the strike committee there. I could not name them. The conversation was what he could do to get to go fishing.

Q. Just what did he say to you?

A. I cannot quote him.

Q. Substantially.

A. He asked what to do to get a clearance permit.

Q. What did you tell him?

A. I told him that it would have to be taken up with the committee.

Q. Did you say anything else to him at all?

A. That was practically all there was to say.

Q. Do you know a witness named Stagnaro?

A. Yes, sir.

Q. How long have you known him?

A. Well, I believe as long as he has been fishing in San Pedro. I couldn't say how long because it was quite a number of years, at least 10 or 12 years.

Q. Did you always get along with him all right?

A. Very friendly.

Q. And during the period of the strike did you have a conversation with him?

(Testimony of George Knowlton.)

A. The way I remember, the circumstances were almost identical with Mr. Castagnola, and the conversation was just about identical.

* * *

Q. In any event, your conversation with Stagnaro was a friendly one, on a friendly basis, was it?

A. Yes.

Q. Do you know the witness Falcone?

A. Yes. [3062]

Q. Did you have any conversation with him during the period of the strike? It is at page 893.

A. Practically the same conversation.

Q. Just repeat it, please.

A. Well, he asked me what would be the procedure to get a clearance permit, and I told him he would have to go before the application committee and have it passed on.

Q. Did you also have conversations of the same general nature with the witness named Guglielmo?

A. I presume I did. I know all the fishermen that were on the stand here, but their names baffle me at times.

Q. And also with a witness named Bregante?

A. Yes.

Q. Also a witness named Vestal? A. Yes.

Q. Also a witness named Tufts? A. Yes.

Q. With respect to Bregante, Guglielmo and Vestal were the conversations substantially the same? A. All except with Vestal

Q. How long had you known Vestal?

A. I should say about four or five years.

(Testimony of George Knowlton.)

Q. What was the conversation you had with him?

A. It was on somewhat the same order. He asked me my opinion. I gave him my opinion. [3063]

Q. Vestal's testimony is at page 994 in the record. What did he say to you?

A. He was working in the cannery at the time and he said he would be unable to go on the picket line. I remarked that he wasn't working 24 hours a day and he could go on nighttime picket line if he wanted to, if he wanted to work with us.

Q. Well, at that time did you say to him that he should do picketing otherwise he wouldn't be able to go out and fish?

A. I definitely did not say that.

* * *

Q. Was your conversation with Mr. Tufts substantially the same as with Bregante and Falcone?

Mr. Andersen: 1016.

A. My conversation with Mr. Tufts was entirely in a different—

Q. (By Mr. Andersen): When and where did you have your conversation with him?

A. Johnny and myself had arguments — I wouldn't say arguments, but discussions on union problems off and on in different localities, and I believe the last discussion was over near the Southern California Cannery.

Q. Did you ever have any conversation with Mr. Tufts—this is at the bottom of 1016 and 1017 of the record—wherein you told him that he wouldn't be

(Testimony of George Knowlton.)

able to buy ice unless he [3064] co-operated with the union. A. Not exactly that.

Q. What did you tell him that was in relation to that?

A. I believe I told him that there was possibilities of the strike went long enough that it could go to that extreme. But I did not tell him definitely that that was a fact.

Q. With respect to gasoline, did you tell him that he would not be able to buy any gasoline if he did not co-operate with the union?

A. If I did, it would be an indefinite situation, that there was possibilities that he wouldn't be able to. It would have been a definite statement.

Q. Now, your conversation with Mr. Tufts at that time, was it a friendly conversation?

A. Very friendly.

* * *

Q. (By Mr. Andersen): In any of your conversations with Mr. Tufts was there any ill will expressed by Mr. Tufts—

* * *

A. Mr. Tufts at one time told he if he ever had to go on the stand he would testify that the reason he joined [3066] the union was to keep from getting his boat sunk. He also qualified his statement. May I carry this on as a two-way conversation, or just what he said?

The Court: I think you had better lay some foundation.

Q. (By Mr. Andersen): When did he tell you this, Mr. Knowlton?

(Testimony of George Knowlton.)

A. Well, I believe it was shortly after the indictment, or sometime after that. I can't recall.

Q. After the indictment. Well, I am talking about this conversation during the strike, Mr. Knowlton.

A. This conversation during the strike?

Q. Yes, this conversation that you had with him about the gasoline and the ice.

A. Will you repeat the question again?

Q. During that conversation did Mr. Tufts use any words expressing any ill will existing between you and Mr. Tufts? A. Never.

Q. Now, with respect to this latter statement that you made, how did that happen to come about and when was it?

* * *

A. As I say, sometime after we was indicted. I can't place the time very closely.

Q. Would you say a week or a month or two months afterwards?

A. Sometime, I believe it was in November.

Q. And where was the conversation held?

A. It was over on the fish harbor.

Q. Were you still friendly at that time?

A. Yes, sir.

Q. How did he happen to make such a statement as that to you, if you know? What was the subject you were discussing? A. I asked him about it.

Q. You asked him about what?

A. A remark was made by the grapevine, as you might get it, that he made a remark that he joined

(Testimony of George Knowlton.)

to keep from getting his boat sunk, and I wanted to ask for firsthand information, so I asked——

* * *

Q. (By Mr. Andersen): In other words, this, simply, that you heard was just hearsay?

A. Until I got it from him directly. [3068]

Q. Then you went and talked to him?

A. Yes.

Q. And this is the conversation that you referred to a few moments ago? A. Yes.

Q. Did you ask him the source of the statement?

A. I asked him the source of the statement, and also asked him who threatened to sink his boat.

Q. Yes? A. He said nobody.

Q. Did you ask him why he made the statement?

A. Yes, I asked him why.

Q. What did he say?

A. He said a long time ago there had been boats sunk, I think the last case had been about 15 years ago, and he wasn't taking the risk, so that is what he was going to testify if he ever had to go to court.

Q. Did he say what was the basis of his statement? A. That was the basis of his statement?

Q. I see. Do you know if he is presently a member of the union?

A. According to his testimony he is not. [3069]

* * *

Q. By the way, at the time of the strike was Mr. Tufts fishing cannery fish or market fish, if you know?

A. He was not doing either. He was working in the cannery.

(Testimony of George Knowlton.)

Q. He was what?

A. He was working in the cannery.

Q. In what capacity, if you know?

A. I believe as a sort of a foreman on maintenance work.

* * *

Cross-Examination

By Mr. Dixon:

Q. Mr. Knowlton, I believe you testified you were never on the picket line during the course of the strike, is that correct?

A. Never had a picket badge on me. I might have been near the line, but I never had a picket badge on me.

Q. Did you ever do any picket duty during the strike? A. I was in the office.

Q. Did you pay any fees to the union for not picketing? A. Yes.

Q. In other words, instead of doing the picketing you paid for not doing the picketing yourself, is that correct? [3070]

* * *

A. Yes.

Q. (By Mr. Dixon): You are the owner of this boat America II? A. Yes.

Q. And any fish caught by you or your boat are sold by you to whoever buys them, is that correct?

A. Not necessarily.

Q. The fish tickets are made out to you——

* * *

The Witness: Yes.

(Testimony of George Knowlton.)

Q. (By Mr. Dixon): And you received the compensation or the money from the dealer to whom the fish is sold, did you not, Mr. Knowlton?

A. I collect; yes.

The Court: What is the difference between collecting and receiving?

The Witness: Well, I understand if you get the compensation for it that is mine. It isn't all mine.

Mr. Dixon: That is all, your Honor.

The Court: What you meant was that you got the money and you distribute the shares, is that what you meant?

The Witness: Yes.

The Court: Very well. Step down.

(Witness excused.)

Mr. Margolis: Your Honor please, one matter with regard to the proceedings tomorrow that your Honor might want to take into consideration at this time, we intend to offer two [3073] expert witnesses with regard to certain matters and in view of some of your Honor's rulings there may be a question as to your Honor's rulings on the admissibility of that testimony.

The Court: I can excuse the jury now and we can take it up.

Mr. Margolis: I just wanted to state that, in order to shorten the proceedings we have prepared in written form what we intend to prove. It is being typed up now.

The Court: An offer of proof?

Mr. Margolis: We thought we might submit it in advance to your Honor.

* * *

(The jury retired from the courtroom at 4:25 o'clock p.m.)

The Court: You think you can finish the whole testimony tomorrow?

Mr. Margolis: With the exception of this matter on which your Honor will have to pass. I don't know whether your Honor will say it is admissible or not. The point is, we thought we could save time by doing it this way. We know that some of the matters we want to submit as an offer of proof your Honor has already ruled on as not admissible, but we do want to get it in. There is another matter about which we are doubtful. We would like to submit it all and if your Honor will indicate what subject matter is material we will limit ourselves except for the purpose of the offer of proof.

The Court: How long will this document be? Could I [3075] read it at noon recess?

Mr. Margolis. That would be rather difficult, your Honor.

Mr. Kenny: One is an agricultural economist. I haven't seen his material but I am sure that it is not noon hour reading.

The Court: And the other is a fish economist, I suppose?

Mr. Margolis: The other, your Honor, is just some research work that has been done which is a tabulation of figures and data from various sources. I don't remember the number of pages, but it is 30 or 40 letter-sized pages, with a number of charts attached.

* * *

Mr. Margolis: Of course we would have to have a stipulation that we could make our offer in that form.

Mr. Dixon: That will be all right, counsel. There will be no objection to that.

* * *

Mr. Margolis: If your Honor please, we have handed up to the Court an offer of proof.

The Court: This is your offer of proof?

Mr. Margolis: This is one of them. The other will be ready sometime today.

(Here followed further discussion between Court and counsel which was reported but not transcribed. During this time the offer of proof referred to was received and marked Defendants' Exhibit GG for identification.)

(The jury returned to the courtroom at 10:20 o'clock a.m.) [3080]

* * *

WALTER B. McCOMAS

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Margolis:

Q. Mr. McComas, you are the W. B. McComas who is one of the defendants in this case?

A. That is right.

Q. And you live at 482 North Cherokee with your family? A. 842.

Q. 842 North Cherokee with your family, is that right? A. Yes.

Q. You are a married man with a family, is that right? A. Yes.

Q. Now you earn your living—I am going to ask some leading questions because your Honor suggested that to permit the speeding up, and if there is any objection I will desist—your occupation is fishing, is that right? [3081] A. Yes, sir.

Q. That is how you earn your living?

A. That is right.

Q. And you have no other source of income?

A. No.

Q. Is that right? A. That is right.

Q. Now you started fishing commercially sometime during the year 1942? A. That is right.

Q. And you have been fishing for a livelihood ever since? A. Yes.

(Testimony of Walter B. McComas.)

Q. By fishing I mean that you have been working on a commercial fishing boat, is that right?

A. That is right.

The Court: What was the year again?

The Witness: '42.

The Court: 1942.

The Witness: That is right.

Q. (By Mr. Margolis): Mr. McComas, you did fish commercially one season before 1942, did you not? A. That is right.

Q. When was that? [3082] A. '23.

Q. You fished one season out of San Diego, working on somebody else's boat? A. Yes.

Q. Now when you started fishing in 1942 did you buy a boat? A. I did.

Q. What size boat did you buy?

A. Thirty-six foot.

Q. How much did you pay for it?

A. A thousand dollars.

Q. Was this boat a boat which you operated by yourself or did you have a crew in addition to yourself? A. No. I had a crew on that boat.

* * *

Q. How large a boat?

A. Two, including myself.

* * *

Q. You sold that boat, did you, in 1944?

A. I did.

Q. About that time you purchased another boat, a smaller boat? A. That's right.

Q. What size boat was this?

A. 26-foot.

(Testimony of Walter B. McComas.)

Q. And this boat, Mr. McComas, was a one-man boat, is that right? A. That's right.

Q. So since purchasing that boat in 1944 you have operated this one-man boat off which you fish yourself?

A. Outside of mackerel season, I have help then.

Q. You do have? A. Yes.

Q. How many?

A. One man besides myself.

Q. You have one man in addition that works with you during mackerel season? [3084]

A. Yes.

Q. What part of the year is that?

A. From September until December.

Q. Do you fish just market fish or cannery fish or both? A. Both.

Q. Can you give us any idea of what percentage of the time—I will withdraw that.

How much of the time each year do you spend fishing approximately?

A. About 10 months.

Q. And the other two months you spend working on your boat, is that right

A. That's right.

Q. Now, of the 10 months, about how much time do you spend fishing market fish and how much time fishing cannery fish?

A. Well, there is about four months of fresh fish and about six months of cannery fish.

Q. Four months of fresh fish and six months

(Testimony of Walter B. McComas.)

cannery fish, about one and a half times as much spent on cannery fish as on fresh fish?

A. Just about.

Q. What portion of your income comes from fresh fish and what portion from cannery fish?

Mr. Dixon: Objected to as immaterial.

Q. Without giving the amount of your income, what portion?

Mr. Dixon: We still object as immaterial.

The Court: It is harmless to give some general idea. Objection overruled.

Q. (By Mr. Margolis): You may answer the question.

A. It is about three to one on cannery fish.

Q. You spend about one and a half times on cannery fish, but you get about three times as much money on the cannery, is that right?

A. That's right.

Mr. Dixon: If the Court please, I move that counsel's remarks be stricken and the jury instructed to disregard them.

The Court: It is just rephrasing the other. I can't see the materiality of it. It doesn't make any difference.

Q. (By Mr. Margolis): During the period you have fished from 1942 on what has been your home port?

A. Santa Monica.

Q. At all times?

A. That's right.

Q. Where have you delivered the fresh market fish that you have caught during that period?

A. To the Bay Fish Market.

(Testimony of Walter B. McComas.)

Q. Where is that? [3086] A. On the pier.

Q. On the pier at Santa Monica?

A. That's right.

Q. Have you delivered and sold all of your fish to the Bay Fish Market at Santa Monica?

A. That's right.

Q. I wonder if you would tell us—before that I will ask you this: Before you go out do you make any arrangements with Bayside Fish Market for what price you will get for your fish before you go out fishing? A. No.

Q. What happens when you come back with a load of fish?

A. I come in and unload, and they take it up and weigh it, and I go out and tie the boat up and come back and see what weight I have, and then collect my money.

Q. How much money do you collect? How do you know how much to collect?

A. Well, whatever the price is.

Q. Well, who tells you what the price is?

A. They do down there where I get my money.

Q. The Bayside Fish Market? A. Yes.

* * *

Q. (By Mr. Margolis): Let's get at it this way: Do you discuss the price with the Bayside Fish Market? A. No.

Q. What does happen?

A. He makes out the ticket and I take whatever he puts down on the ticket.

(Testimony of Walter B. McComas.)

Q. And that has happened always since 1942, is that right? A. Yes.

* * *

The Court * * * How many dealers are there at Santa Monica?

The Witness: Two.

The Court: What is the other one?

The Witness: Delucca.

The Court: Did you ever sell him any fish?

The Witness: No.

Q. (By Mr. Margolis): Has he ever bid for any of your fish? [3088] A. No.

Q. Have you ever seen the dealers out on the wharf bidding against each other? A. No.

The Court: Here is a question I would like to ask: Why do you fish at Santa Monica instead of Malibu or Point Mugu or San Pedro or somewhere else?

The Witness: Because my boat is there.

The Court: Because your boat is there?

The Witness: Yes.

The Court: It is convenient to your home?

The Witness: That's right.

The Court: I see.

Q. (By Mr. Margolis): There are a number of fishermen who fish out of Santa Monica, are there not? A. Yes.

Q. And there are others who have San Pedro as their home port, and others at Newport Beach, and so forth? A. That's right.

(Testimony of Walter B. McComas.)

Q. And you have arrangements there for a place to keep your boat?

A. I have my own mooring, yes.

Q. Those are arrangements a fisherman has to make when he has a boat, is that so?

A. That's right. [3089]

The Court: In other words, what I was getting at is a man chooses the place as a matter of choice. Either for his own convenience—You don't fish at Santa Monica because you like to fish mackerel or any particular kind of fish?

The Witness: No.

The Court: It is because it is convenient to your home and you have your boat there?

The Witness: Yes.

* * *

Q. (By Mr. Margolis): Mr. McComas, do you ice your fish?

A. I have an ice-box on, yes.

Q. On the boat, is that right?

A. That is right.

Q. Sometimes you are out several days, are you?

A. Three or four days at a time, maybe five days.

Q. And you ice your fish while you are out fishing?

A. That's right.

Q. Do you ever ice fish after you come in?

A. No.

Q. Why not? A. I haven't facilities.

Q. Are there any other reasons?

A. Well, it is really too much trouble to go to that to handle it. They wouldn't lift the fish up on the pier for you in the first place.

(Testimony of Walter B. McComas.)

Q. Who wouldn't lift the fish up on the pier?

A. The dealer there.

Q. It takes equipment to lift the fish up on the pier?

A. Oh, yes, it takes a hoist.

Q. Who does that equipment belong to?

A. It belongs to the fish dealer.

Q. They will lift it up for you when you sell it, is that right? [3091]

A. That is right.

Q. And not otherwise? A. No.

Mr. Margolis: Cross-examine.

The Court: Cross-examination?

Mr. Dixon: No, your Honor.

The Court: Step down.

(Witness excused.)

The Court: Next witness.

Mr. Margolis: Mr. Phelps.

ROBERT M. PHELPS

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Margolis:

Q. Your name is Robert M. Phelps, is that right? A. That is right.

Q. And you are one of the defendants in this case? A. Yes. [3092]

(Testimony of Robert M. Phelps.)

Q. What is your address?

A. 6257 Tipton Way in Los Angeles.

Q. Is that where you actually live?

A. I live on a boat I am fishing on most of the time.

Q. Do you have any other home of your own?

A. No. I don't.

Q. What is that address that you gave us?

A. That is my father's and mother's home.

Q. How long have you been a commercial fisherman—you are a commercial fisherman, aren't you?

A. That is what I do for a living.

Q. Do you do anything else for a living besides engaging in commercial fishing?

A. Occasionally a little bit of engine work, but not much.

Q. What do you mean by engine work?

A. Overhauling engines on other commercial boats.

Q. When you do that engine work you do that for somebody else and you get paid for that, is that right?

A. Yes, sometimes; sometimes just for free.

Q. When did you start fishing commercially?

A. In 1934.

Q. And at that time did you buy a boat?

A. Yes, I did. I bought a 28-foot jig boat.

Q. Is this a boat that was operated by a crew of one [3093] man or more than one man?

A. By a crew of one.

(Testimony of Robert M. Phelps.)

Q. You operated that boat and worked on it yourself? A. I did.

Q. You paid \$350 for that boat? A. Yes.

Q. You had it for how long? A. One year.

Q. Then you sold that boat, is that right?

A. That is right.

Q. For the same amount you paid for it?

A. Yes.

Q. Then after that did you go to sea for a few months?

A. Yes, I was back to sea. I went back as an engineer, marine engineer.

Q. You had been a seaman prior to the time you went fishing?

A. Yes, I had been a fireman and oiler and marine engineer up until that time.

Q. You went to sea then for a short time, is that right? A. Yes.

Q. And after that you came back and went back fishing and you have been fishing ever since, is that right?

A. That is right. I have made a few small trips on ships and I worked a very short time for the Bureau of Power [3094] and Light in Los Angeles on a frequency change.

Q. But most of the time since then you have been fishing? A. That is right.

Q. Did you fish for a while on other people's boats.

A. I have fished most of the time on other people's boats.

(Testimony of Robert M. Phelps.)

Q. On what sort of a basis?

A. Always a share basis.

Q. The same kind of a share basis that has been described here in the testimony, is that right?

A. That is right.

Q. And on boats in which you have no interest whatsoever?

A. Yes.

Q. Did you buy another boat in about 1940?

A. Yes, I bought another little 28-foot jig boat and I had it for about four months and I sold it.

Q. You paid \$650 for it, is that right?

A. Yes.

Q. Since then have you owned any boats?

A. No. I haven't.

Q. You don't own a boat now and you have no interest in any boat?

A. No, I don't.

Q. And you are earning your livelihood, your entire livelihood, from fishing on boats owned in total by other persons, is that right?

A. That is right.

Q. Do you have any of your own fishing gear?

A. At present I do have a little bit. I have three fish traps.

Q. You might explain what those are.

A. Those are a metal cage with funnels that go in and fish go in there and you catch them.

Q. What kind of fish do you catch in fish traps?

A. Well, these were to catch bass, rock bass.

Q. Did you have more gear than that previous to this?

A. At one time I had shark nets.

(Testimony of Robert M. Phelps.)

Q. What happened to that?

A. Well, they wore out and I didn't make enough to buy more so I don't have any more shark nets.

* * *

Q. When you were operating your own boat during the periods that you operated your own boat, did you fish market fish or cannery fish or both?

A. Both.

Q. And when you sold your cannery fish—incidentally, what is your home port?

A. Newport Beach now.

Q. It had been other ports?

A. San Pedro until the time the war started.

Q. And at the time the war started you and a lot of other fishermen shifted to Newport?

A. We went to Newport because the Coast Guard and Navy regulations were too strict to go in and out of San Pedro.

Q. And made fishing operations——

A. It made it practically impossible to fish there.

Q. So you have been at Newport ever since?

A. Yes.

Q. Now when you were fishing fresh market fish, did you sell your fish to the dealers when you had your own boat?

A. Yes, I did. [3097]

* * *

Q. Will you state how the price was determined for the fish which you sold?

A. Well, I don't know how it was determined. At the time I had the boats I took whatever they gave me.

(Testimony of Robert M. Phelps.)

Q. You just went in and took what they gave you? A. Yes.

Q. Did you ever get a different price from different dealers on the same day?

Mr. Rubin: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

I want to call counsel's attention to part of the memorandum of law that was handed to me yesterday.

Mr. Margolis: Memorandum of law, your Honor?

The Court: Yes, by the defendants.

Mr. Margolis: Yesterday?

The Court: Yesterday.

Mr. Kenny: I guess that was mine. [3098]

The Court: And three or four books.

Mr. Margolis: I thought that was several days ago.

The Court: "A co-operative endeavor which transgresses that line (that is, they talk about illicit practices) cannot justify itself by pointing to evils afflicting the industry or to a laudable purpose to remove them."

Mr. Margolis: If your Honor please, there was testimony about competition and price bidding.

The Court: We went all through that, counsel.

Mr. Margolis: We feel we should have a right to meet that testimony, your Honor.

The Court: The objection is sustained. You have had the right to meet it which the law allows you.

(Testimony of Robert M. Phelps.)

Q. (By Mr. Margolis): Did you ever ice fish and hold it when you had your own boat?

A. Yes.

Q. For how long?

A. Well, while I was out on a trip until I came in.

Q. Did you ever hold it after you came in?

A. No, you can't hold it.

Q. Why not?

A. Fish to be kept, you got to keep that at a certain temperature in a refrigeration box. You can't just throw ice on it and keep it forever. [3099]

Mr. Margolis: You may cross-examine.

Mr. Dixon: No questions.

The Court: Step down.

(Witness excused.)

The Court: Next witness.

Mr. Margolis: Mr. McLauchlan.

CHARLES McLAUHLAN

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

* * *

Direct Examination

By Mr. Margolis:

Q. Your name is Charles McLauchlan?

A. Correct.

(Testimony of Charles McLauchlan.)

Q. And you live in Santa Ana? A. Right.

Q. What is your occupation?

A. You mean now?

Q. Yes.

A. Mostly a defendant and partly I have a few bees. [3100]

* * *

Q. Have you been a fisherman in the past?

A. I have.

Q. Is that what you have done for a living?

A. True.

Q. When did you start fishing for a living?

A. In July of 1944. Before that I worked on a boat getting it ready to fish for about six weeks.

Q. But before you went to work on that boat in 1944 to get ready to fish, you had not fished commercially, is that right? A. That is right.

Q. And this was at Newport Beach, was it?

A. Correct.

Q. And during the time you fished, was Newport Beach your home port? A. That is right.

Q. Now what kind of a boat did you go to work on?

A. It is a 40-foot double ender, a jig boat and mackerel boat.

Q. What size crew does it have? A. Two.

Q. Yourself and one other?

A. The man who owned it.

Q. Did you own any interest in that boat on which you went to work? A. No, sir.

Q. You worked on the usual share basis, is that right? A. That is correct.

(Testimony of Charles McLauchlan.)

Q. How long did you work on that boat?

A. For about six months.

Q. Then what did you do?

A. Worked on other boats.

Q. All boats belonging to other people?

A. That is true.

Q. On a share basis? A. That is correct.

Q. How long did you continue working on other boats?

A. For about an additional year and three months.

Q. That was all the commercial fishing you had done? A. That is true.

Q. During the time that you have fished commercially, and as a matter of fact, at any other time, you have never owned a boat, is that right? [3102]

A. No, sir.

Q. You have never owned any interest in a fishing boat, is that right?

A. Well, I invested a lot of my time in getting a boat ready that was going to operate, but I didn't own any part of the boat because of the time I put in fixing it up.

Q. But you had no interest in the boat?

A. That's right.

Q. You merely worked on it with the owner getting it ready to go fishing, is that right?

A. Well, I worked on another boat getting it ready to go fishing myself, I was going to operate this boat myself alone, but I never owned any penny in it.

(Testimony of Charles McLauchlan.)

The Court: Let's see. The total length of time that you worked as a fisherman was approximately a year, is that right?

The Witness: A year and a half would be more correct.

The Court: All right.

Q. (By Mr. Margolis): At the end of that approximately year and a half of commercial fishing, what did you do?

A. I gave up the boat that I had just started to fish to become the business manager for the fishermen's union.

Q. At Newport Beach?

A. At Newport Beach.

Q. Is that the Newport Beach unit of Local 36, one of the defendants in this case?

A. That is true.

Q. And how long did you continue to hold that job?

The Court: When did you take it?

The Witness: September 23, 1945.

Q. (By Mr. Margolis): And how long did you continue to [3104] hold that job?

A. Until November 1, 1946.

Q. Since then have you had any connection with the fishermen's union aside from this case?

A. I have been a member. I am now the treasurer of the unit at Newport Beach.

Q. During the period that you were fishing did you fish cannery fish or fresh market fish, or both?

A. I fish cannery fish and fresh market fish both.

(Testimony of Charles McLauchlan.)

Q. About what proportions?

A. Well, that could be in terms of value or tonnage.

Q. Well, suppose you tell us how much time you spent fishing fresh market fish and how much time you spent fishing cannery fish?

A. I spent most of the time fishing cannery fish. I would say I spent three months fishing abalone, which are a market fish.

Q. And the rest of the time cannery fish?

A. The rest of the time albacore and mackerel, which are cannery fish.

Q. Before you started fishing you had been a shipyard worker, is that right?

A. That is true.

Q. You were active as an officer and member of the Local 36 at Newport Beach during the course of the strike in [3105] June of 1946, were you not?

A. I was the business manager.

Q. Were you active? A. That is true.

Q. You were the man who was generally in charge of the Newport unit, is that right?

A. Under the executive committee and under the strike committee.

Q. You say "under the executive committee"; you mean the over-all executive committee of Local 36?

A. Under that executive board made up of representatives from all the different units which meet in San Pedro. Also under the executive committee of the Newport Beach unit.

(Testimony of Charles McLauchlan.)

Q. I see. During the course of that strike in June of 1946 was there a system utilized in Newport Beach known as a clearance card system?

A. That is true.

Q. Will you tell us how that system worked?

A. Cards were printed of two colors. One of them was marked "Clearance Card"; the other one was marked "Registration Card." Those fishermen who wanted to co-operate in the activities of the strike came into the office and a card of each sort was filled out for each man. The registration card was kept in the file; the clearance card was kept by the man. The cards were numbered. The clearance card had around the [3106] rim dates, consecutive with the days of the month. From the time the man came in and registered, upon explanation of the way operations were conducted, he agreed, if he wished, to contribute a certain number of hours as a picket, and this would clear him for a certain number of days. And during these intervening days he would go fishing, and at the end of that period he would report and be assigned a post as a picket for another few hours. And this continued for the duration of the strike.

Q. Did all the boats which fished out of Newport Beach obtain clearance cards?

A. No, they did not.

Q. Were there boats that fished continuously during June of 1946 which did not obtain clearance cards?

A. That is correct.

Mr. Rubin: Does that refer to fresh market fish, counsel?

(Testimony of Charles McLauchlan.)

The Witness: That is true, fresh market fish.

Q. (By Mr. Margolis): Was any action taken by the union with respect to those boats which fished without obtaining clearance cards?

A. Yes, there was.

Q. Will you tell us what action was taken?

A. First of all we tried to find out which boats were in that category, and then the strike committee would send a couple of members of the union, or even non-members of the [3107] union who were interested in this activity, to explain to these non-co-operating boats what the issues were. And we would send one committee, and then we would send a different committee, who would explain to these people in question what the situation was in detail, and how they would benefit by the activities of the union in this situation.

Q. Any other action taken?

A. There was no action taken on the question of people who would not come in and register. We just tried to get their co-operation to come in and register.

Q. And you did get the co-operation of some, and of others you did not, is that right?

A. That is true.

Q. And this applies to all boats fishing fresh market fish?

A. That is true.

Q. Did you have a process or policy with regard to declaring boats unfair?

A. That is true.

Q. Will you explain what was done in that regard?

(Testimony of Charles McLauchlan.)

A. We declared boats unfair who continually would go past the picket boats to sell fish. We would declare them unfair after we had sent two or three committees, as the case might be, or if they were hard to find maybe we would only succeed in having one committee reach them and talk with them, and if the committee was unable to, by explanation, show them that their interests lay with the majority, then the committee would come back to the strike committee and report in detail the attitude of these non-co-operators. And sometimes we would declare such a boat unfair; other times we would withhold action until a further committee had seen them.

Q. Do I understand that during the period of the strike fish was being delivered to dealers whose places were being picketed? A. That is true.

Mr. Rubin: That is objected to as calling for a conclusion of the witness and ambiguous as to what dealers. There are several dealers there.

The Court: The objection is overruled. You can clear that up on cross-examination.

Q. (By Mr. Margolis): What dealers were those that were being picketed?

A. The dealers being picketed were the Harmon Fish Company—J. P. Harmon Fish Company, and the Bayside Fish Company.

Q. And those are the companies you referred to in your answer a moment ago?

A. That is right.

* * *

(Testimony of Charles McLauchlan.)

Q. (By Mr. Margolis): How many were there in June of 1946, in the event there has been any change?

A. There were five major dealers, and there were one or two people who, although retailers, bought a little fish from fishermen.

Q. With respect to the boats that were declared unfair, that was simply a motion that was passed saying that the boats were unfair, is that right?

A. That is true.

Q. What was done, if anything, pursuant to that motion declaring the boats unfair?

A. There was considerable discussion of this question, and it was the decision of the strike committee, and we finally took it to the membership, and the membership agreed that any boat that was declared unfair, after being visited by his friends, a committee from the union composed of his friends, people who knew him very well, that if such a boat then did not co-operate he should not be treated any longer as a friend.

Q. What do you mean by that?

A. It is one of the customs in the fishing fleet for the exchange of information about fishing.

Q. Where the fish are found?

A. Where the fish are being caught at that particular [3110] time, and what gear is most successful, and which way the fish are moving, and so forth. So the fishermen agreed not to give any of this information to those who did not co-operate with all the fishermen.

(Testimony of Charles McLauchlan.)

Q. Was there any other action taken in addition to that?

A. Further, that we should have no truck with such people, that is, that we would cut them dead, as you might say; not even see them on the street.

Q. Anything else besides that, or is that all?

A. I believe that is all.

Q. Were you in the court room when Mr. Irvan D. Anderson testified? A. I was.

Q. You heard his testimony? A. Yes.

Q. Do you know Mr. Anderson? A. I do.

Q. How long have you known him?

A. Well, somewhat a shorter time than I have been fishing. I would say a couple of years.

Q. Were you friendly with him?

A. Not unfriendly. I would say I don't know him well enough to be a friend.

Q. An acquaintance? [3111]

A. An acquaintance, yes.

Q. Did you ever have any conversation with him about joining the union or payment of dues?

A. Yes, sir, I did.

Q. When did that conversation take place?

A. Well, several times. At different times, usually when the bait boat upon which he works was tying up and the men were coming ashore, and the conversation was with the crew. Very seldom with one man.

Q. In other words, it was with him as a member of a group, is that right? A. That is right.

(Testimony of Charles McLauchlan.)

Q. And in which you talked and he and other members of the group talked, is that right?

A. That is right. It may be that once maybe I engaged him in conversation and the others went away and we were left talking.

Q. That may have happened on one occasion?

A. Yes.

Q. Over what period and about how many of these conversations were there?

A. Between three and six times.

Q. Over what period of time?

A. Over a period of a year, roughly.

Q. Were these conversations all pretty much the same or were they different from time to time?

A. Well, they were progressive. I mean, there would be different discussions, different points brought up at each one, but they were in general about the union and the attitude of individuals toward the union, fishermen toward the union, bait haulers, who are a particular kind of fisherman, toward the union.

Q. Will you tell us what the substance of these conversations was?

A. Oh, the substance of the conversations on both sides would be summarized in this way:

The men on the crew were of different opinions. Some of them agreed that unions in general were good. In fact, Mr. Andersen himself was a member of a union, and although he had had some rather bad experiences, in general his experience with his

(Testimony of Charles McLauchlan.)

previous had been good. "But," he said, "how will the union help me as a fisherman?" And I would explain.

For instance, the bait haulers, they are specialists, they haul with a net anchovies and sardines. The anchovies and sardines for a period of four months are sold as bait and ground and resold by the canneries to the mackerel fishermen. [3113]

* * *

Mr. Rubin: This is a conversation?

The Witness: This is the substance of the conversation.

So then the bait haulers, they get a certain price for their fish and they sell to the cannery which, in turn, grinds it and resells it to another kind of fisherman.

Now by understanding with the cannery over a period of time the fishermen's union has reached this understanding——

* * *

So the union in its contract on the mackerel price and conditions of the delivery of mackerel, stipulates that the bait crews shall receive for the bait they catch the same price as the contract calls for the delivery of mackerel. So what happens to the bait haulers depends upon what happens to the mackerel fishermen, and that is part of the conversation that I had with the bait haulers.

Some of them were of this opinion, well——

The Court: You mean they stated that to you?

The Witness: They stated it to me; yes, sir.

(Testimony of Charles McLauchlan.)

The Court: Did Mr. Andersen state it to you?

The Witness: He especially state it to me.

The Court: That is what the question is about.

The Witness: He especially stated to me, "Well, that is fine, we are sure now that we are going to get this price for [3115] our bait, that is lovely, but why should I pay any dues to the union."

* * *

The Court: This is another conversation?

The Witness: I say there were, according to my previous testimony, probably three conversations. Now it is hard for me to say that all of these things were said at any one, but to my recollection these conversations carried about the same [3116] content, you see, and I was saying the same thing to Mr. Andersen two or three times to try and convince him. So this was the trend then of the argument back and forth.

I was saying to Mr. Andersen, "You should be in the union which has, before you came fishing, benefited you and which all the time you have fished is benefiting you. You should be a part of this organization and help to pay hall rent and electric bills and keep the necessary personnel on the docks to sell you shotgun shells when you need them and to issue cards telling you when there is a meeting so you can come and express yourself and be part of this organization and run this organization."

And his conversation was to the degree, "Well, I am very busy, I work on this boat 20 hours a day.

(Testimony of Charles McLauchlan.)

When we finally get the bait in then the net is broken down and we have to repair the net. And in the season when we do get the fish I have just time enough to sleep, and if the fish are hard to find we might run and make five or six (what we call dry hauls; that is we put the net out and the fish get away because the water is too deep) and we haul the net back in——”

Mr. Dixon: If the Court please, are we to understand that this is still part of this conversation?

The Witness: That is correct.

The Court: I understand it is.

Mr. Dixon: All right. [3117]

The Witness: So he says, “Anytime that I would be able to come to a meeting, it would be at the expense of my sleep.”

And I would say, “The union does not demand that you come to a meeting, we do not have any fine that says if you don’t come to a meeting it costs you an extra dollar. We are a democratic group and we just urge you to come.”

I said, “We even will try to have a special meeting on a time when there isn’t any bait or when you are tied up for a while so you can come and be part of this democratic operation.”

And Mr. Anderson said, “Well, this is considerable trouble. I am very happy to accept the price of fish and I wish you the best of luck but,” he says, “I don’t care to pay any dues and I don’t want to come to any meetings.”

(Testimony of Charles McLauchlan.)

And I would keep trying, and I would keep trying. I would go to this boat as it came in, and I would maybe—— [3118]

* * *

Q. Did he ever join the union?

A. He never joined the union.

* * *

Q. Did he do anything else in connection with the union? A. Well, I would say yes.

Q. What did he do?

A. Now I don't know whether it was, whether he wanted to do it, but he did two things: In the spring of last year there was an attempt to limit the size of bait nets, and this was a well organized campaign in the state legislature, and when we heard about it all the bait haulers were up in arms——

Mr. Rubin: We don't see any materiality to this at all, your Honor. We object to it on the ground it is immaterial.

The Witness: Mr. Andersen contributed——

Mr. Rubin: Just a moment. Your Honor, we object on the ground it is incompetent, irrelevant and immaterial.

The Court: Yes, I think you had better get back to the traditional method of trying lawsuits by question and answer.

Mr. Margolis: This is preliminary.

Q. Did the union take some action in connection with pending legislation concerning the size of bait nets? A. Yes, sir.

(Testimony of Charles McLauchlan.)

Mr. Rubin: That is objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained. [3119]

* * *

Q. Mr. McLauchlan, have you ever worked on a boat operated by Mr. Naylor? A. Yes.

Q. By the way, that is the Mr. Naylor who testified here?

A. That is true. He is the owner of the Bayside Fish Market.

Q. When did you work on this boat operated by Mr. Naylor?

A. That was from about the middle of December 1944 to about the middle of February 1945.

Q. What was the name of the boat?

A. It had no name.

Q. No name.

A. It had a number, which I do not remember.

Q. How big a boat was it?

A. It was about 40 feet long.

Q. How large a crew?

A. It had a crew of three.

Q. Including yourself?

A. Including myself.

Q. You had no interest in that boat?

A. No interest.

Q. What kind of fish did the boat go after?

A. Sharks.

Q. Exclusively?

A. At the time I was fishing the boat.

Q. What was done with the shark that was caught by that boat?

(Testimony of Charles McLauchlan.)

A. The shark and the liver were sold—the shark itself was sold to Mr. Naylor and the liver were sold through Mr. Naylor.

Q. All of them? A. All of them.

Q. Any shark or liver offered to anybody else?

A. No.

Q. Did Mr. Naylor get a share, some share of the proceeds in connection with his ownership of the boat, or operation of the boat?

A. That is true. [3121]

Q. In addition to fishing, using the boat for fishing, did you and other members of the crew do any work on the boat or other equipment?

A. On the gear.

Q. You mean on the nets?

A. On the nets.

Q. What did you do in connection with the nets?

A. Well, as we used the nets they would gradually become somewhat slimy and some of them were new and some were not. The ones that were not new would be torn in places. So when we came in with a load of fish we would tie the boat up, we would unload the nets, put them out on the drying rack, we would take them from the drying rack to where we would mend them to the tank vat where they would be tanned by soaking in this boiling solution of tanning, which is oak bark and water, for a period of time. Then they would be taken out of the tan vat onto the boat and we would go fishing again.

Q. As I understand your testimony, with regard to June of 1946 there was fishing conducted during that month? A. There was.

(Testimony of Charles McLauchlan.)

Q. How did the amount of fish that came in during the month of June 1946 compare with other months when you were present?

Mr. Rubin: Just a moment. That is objected to as calling for a conclusion and not the best evidence. [3122]

The Court: Well, if he knows he can answer.

The Witness: There was more fish in Newport harbor during the month of June, during the strike period, than there has been since or before.

Q. (By Mr. Margolis): At any time that you know about, is that right?

A. That is true. And it all sold at a good price.

Mr. Rubin: Now, if your Honor please, we submit that that last answer is not responsive.

The Court: That is not responsive. It may be stricken.

Mr. Margolis: We would like to have this document marked for identification.

The Clerk: HH.

(The document referred to was marked Defendants' Exhibit HH for identification.)

Q. (By Mr. Margolis): Mr. McLauchlan, I show you a document that has been marked Defendants' Exhibit HH purporting to be the strike committee minutes for June 12—that is June 12, 1946, is it not?

A. Yes.

* * *

Mr. Margolis: If your Honor please, at this time we offer Defendants' Exhibit HH, for identification, in evidence.

* * *

(Testimony of Charles McLauchlan.)

The Court: Very well. Admitted in evidence.

(The document referred to was marked Defendants' Exhibit HH, and was received in evidence.)

Mr. Margolis: Ladies and gentlemen of the jury, I would like to read to you the minutes, at least a portion of them, the whole minutes will be available to you, however.

(Whereupon counsel read to the jury from Defendants' [3124] Exhibit HH.)

Q. (By Mr. Margolis): Incidentally, what is the Souder boat that is referred to in these minutes?

A. It is the boat owned by—well, I am not sure of the ownership, but it is the boat operated by the man Morris Souder who testified here in behalf of the prosecution.

Q. And is that a bait boat?

A. It is a small boat which can be used for bait fishing.

Q. Was it doing bait fishing at that time, do you know?

A. At that time I don't know. When I say "bait fishing" I mean the catching of certain species of tuna, and so forth, with bait and hook and line.

Q. Do you know whether it caught bait?

A. No. it didn't catch bait.

Mr. Rubin: There are two more sentences, Mr. Margolis. If you don't want to read them I will read them at this time.

(Testimony of Charles McLauchlan.)

Mr. Margolis: I will read them. "Discussion on who is on the putrid list and how to contact those persons."

Mr. Rubin: On the first page "Phelps reports that as Picket Captain we are better set up now than ever before and our picket lines are full for several days ahead."

That makes the whole minutes.

* * *

Mr. Margolis: If your Honor please, at this time we would like to offer a part of an exhibit that we didn't have an opportunity to read that wasn't offered. Government's Exhibit 301, a portion on page 1 which was not part of the government's offer.

* * *

The Clerk: II. [3126

(The document referred to was marked Defendants' Exhibit II, and was received in evidence.)

* * *

So you will know what I am reading from, this is a regular meeting of Newport fishermen, May 20, 1946.

(Whereupon counsel read to the jury from Defendants' Exhibit II.)

Q. (By Mr. Margolis): Mr. McLauchlan, with reference to this reading of a letter from the Technical Fisheries on the shark question, do you recall what that pertained to?

(Testimony of Charles McLauchlan.)

A. At that time the shark fishermen were having a great deal of trouble, because the dealers had dropped the price from 15 cents a pound to two or three cents a pound. [3127]

* * *

Q. (By Mr. Margolis): Was the union engaged in any activities at this time in connection with the Technical Fisheries and the shark question?

A. That is true.

Q. What sort of activities? What was the union doing?

A. The union was trying to help its members who fished shark to find some way of getting a little more money and not to be wasting the carcasses of the shark. [3128]

Q. Was it trying to find additional outlets for the shark? A. That is it.

Q. What was this Technical Fisheries operation that I referred to?

A. They were a concern in San Francisco who had experience during the war in the salt during curing of various fish that hadn't usually been treaded in that manner before.

Q. And they were experimenting in a new operation at that time, is that right?

A. They had been experimenting, and we thought they might give us some leads for more utilization of fish products.

Q. I want to direct your attention to Government's Exhibit 302, which is a copy of the Newport Beach minutes or the original of the Newport Beach

(Testimony of Charles McLauchlan.)

minutes for special meeting, Fishermen's Union, Local 36, May 27, 1946, and particularly to the portion reading as follows: "Question by Mills of how our strike will coincide with the surplus of northern fish." Does this state accurately everything that was said on that particular subject referred to?

Mr. Dixon: If the court please, it doesn't refer to anything this particular witness said, and these are the minutes of his own organization. I think since it is not attacking anything that he said that would be a violation of the general rule. [3129]

The Court: Read your sentence again, will you please?

Mr. Margolis: "Question by Mills of how our strike will coincide with the surplus of northern fish."

The Court: Your question is?

Mr. Margolis: I don't know whether my first question was answered, whether this represents accurately everything that was said on this subject.

Mr. Dixon: We object to it on the grounds already given, your Honor.

The Court: The objection is overruled. You may answer it yes or no.

The Witness: No.

Q. (By Mr. Margolis): Will you tell us what was said on that subject?

A. Considerable was said.

Q. Give us as brief a summary of what was said as is possible and yet cover it.

(Testimony of Charles McLauchlan.)

A. Well, Mr. Mills explained that there was a great, in fact, the largest cold storage holdings of what are called rock fish filets in history.

Q. That is a fresh market fish?

A. That is a fresh market fish that is caught in great quantities in northern California and Oregon by members of the International Fishermen & Allied Workers of America. And that this quantity——

* * *

And that because of this terrific holding the price was quite low, and because of the low price the fish, even after paying transportation charges, could be delivered in the Los [3131] Angeles area and sold at prices very low in comparison even to local fish.

And his question was as to what good would it do us to withhold our production trying to get better wages and at the same time the market would be filled with this fish from the north.

The Court: Did he say “wages” or “prices”?

The Witness: I think he said “wages.”

The Court: Are you sure of that?

The Witness: I said I think so. I am not sure.

The Court: You are not sure?

The Witness: No.

* * *

Q. Now I want to direct your attention to the same minutes, page 2, about two-thirds of the way down the page, “McLauchlan says coercion, yes, but that type of action is what shows we are growing up into a unified union of coastwise fishermen and

(Testimony of Charles McLauchlan.)

not a little Local 36. We are in an emergency and we should follow our executive board recommendation."

Now will you state whether or not that correctly and fully sets forth the substance of what you said on that subject at that time?

A. The words as written here, I would say, give a considerably different impression.

The Court: Did you write them?

The Witness: I did not write these words.

The Court: Are those your minutes?

The Witness: I made the talk that is written in the minutes.

The Court: All right.

The Witness: They give a considerably different impressions than what I said.

Q. (By Mr. Margolis): Will you tell us what you said?

Mr. Rubin: That is objected to as varying the terms of a written instrument.

If your Honor please, yesterday in discussing this—I am not going to argue the other question, except to say there is a difference between a confession which may be controverted and an admission against interest which may not be varied.

The Court: Admissions against interest, they can explain, they can deny that they said it. The objection is overruled. It is for the jury to determine which statement is accurate.

The Witness: It is all right to answer?

The Court: Yes.

(Testimony of Charles McLauchlan.)

The Witness: This meeting followed a meeting which had been held in San Pedro.

Mr. Dixon: Now, if the Court please, I ask that the witness be instructed in the interests of expediting the matter to state just what he said.

The Court: That is right. Answer the question.

The Witness: Okay.

That is what I was explaining to the membership, that in the meeting in San Pedro we had discussed this thing very thoroughly and we had realized that in any democratic organization you would never get unanimity, that there would always be at least one person who would have a different opinion, and that there might be as much as—well, we will say, even 40 per cent might have a different opinion—but I explained how, when we have an election for president of the United States, if the Democrats win why this president is the president of the Republicans who lost just the same, and that you might call it coercion for the Republicans to have a Democratic president and to be bound by his executive decisions, but that was part of the democratic process, and that we as fishermen and in our fishermen's union had just as much right to use this tried process of democracy as the people of the United States; that it was part of our democratic traditions that the minority should be bound by the decisions fairly arrived at of the majority.

Mr. Rubin: Now, we move to strike that as self-serving.

(Testimony of Charles McLauchlan.)

The Court: The motion is denied. It is admitted on the ground, as I heretofore indicated, that it was part of the statement.

Mr. Margolis: Your Honor please, with respect to Government's Exhibit 303 we offer the omitted portions, the portions omitted by the Government in its offer, which appears at the top of page 2 and at the top of page 3 thereof.

(The document referred to was passed to the Court.) [3135]

* * *

The Court: It may be admitted.

The Clerk: JJ.

(The portion of the document referred to was received in evidence and marked Defendants' Exhibit JJ.)

Mr. Margolis: Ladies and gentlemen, I want to read to you from what was Government's Exhibit 303 and which is now Defendants' Exhibit JJ in part, which are the minutes of a special meeting of the fishermen of Local 36, May 29, 1946. This is the Newport local.

(At this point counsel read Defendants' Exhibit JJ to the jury.)

Q. (By Mr. Margolis): Referring to the same minutes from which I have just read, Mr. McLauchlan, I want to direct your attention to a portion on page 2 which reads, "He explained John Horman's stand and why John did not sign." Is

(Testimony of Charles McLauchlan.)

that what was said at the meeting or is that simply a reference to the subject of what was said? [3136]

A. Well, it is not what was said.

Q. Will you tell us what was said?

Mr. Rubin: Same objection as heretofore made, if your Honor please. This doesn't state anything. This doesn't state who said what. It says he explained John Horman's stand. In the first place, is is a conclusion. There is nothing here for anybody to deny.

Mr. Margolis: The conclusions are admitted against us, your Honor.

The Court: He explained John Horman's stand? There isn't anything in the record about what John Horman's stand is. The objection is sustained.

Mr. Margolis. We ought to be able to show what it is.

The Court: It does not say whether it is good or bad. The objection is sustained. There is no harm done to anybody.

Mr. Margolis: It does appear from the minutes who said this.

The Court: The objection is sustained, counsel.

Mr. Margolis: May I have Exhibit 328?

(The document referred to was passed to counsel.)

Q. (By Mr. Margolis): I want to direct your attention to Government's Exhibit 328, which are the strike committee meeting minutes of Newport of June 4, 1946, and particularly to that portion read-

(Testimony of Charles McLauchlan.)

ing, "Moved, seconded that every man that [3138] belongs to this union must stand on the picket line. Carried. Discussion on penalty for men who do not stand picket line decided the strongest penalty would be to declare the man unfair." Now I want to ask you whether or not at any time during the strike any stronger penalty was imposed upon anyone than declaring the man unfair for any activity in connection with the strike. A. Never.

Q. And you have already told us what it meant to be declared "unfair," is that right?

A. That's right.

Q. I also would like to direct your attention to this portion: "C-o-m," I guess that stands for committee? A. Yes.

Q. "Committee for distribution of letters along highway 101. Duty: Contact boat, give letter, write down the boat's name and number, explain the union's problems, the betterment of the whole industry. To be taken up later." Would you explain what is referred to by "Highway 101" there?

A. That is a stretch of highway bordering on Newport Harbor along which are a number of boat slips and a little repair yards where fish boats tie up.

Q. And this referred to that portion of 101, is that right? A. That is right.

Q. And was this action of contacting the boat, explain the union's problem, the betterment of the whole industry, and so forth, the action that was followed out? A. That is right.

(Testimony of Charles McLauchlan.)

Q. I want to call your attention to page 2 of the same exhibit, the portion reading: "Moved, seconded that suitable cards be made to be handed persons who cross the picket line. Carried." Would you explain what, if anything, was done with [3139] reference to that motion?

A. Well, these cards were mimeographed, and—do you want the idea?

Q. Do you have any of those cards or were they distributed out at that time?

A. I think they were all distributed.

Q. What was the substance of what the cards said?

A. The substance was that the fishermen wanted to know when they went fishing how much they were going to get for their fish when they landed it. They wanted to know before they went fishing. And in order to do this we had to have it in a contractual relation with—

The Court: Is this what was said on the card?

The Witness: That's right. [3140]

* * *

Q. What was done with those cards?

A. That we wanted the co-operation of the public.

Q. What was done with the cards?

A. The procedure was as follows: each picket had a few of these cards, and if the words on his banner did not dissuade people from going in, then when the people came out he would hand them this card. [3141]

* * *

(Testimony of Charles McLauchlan.)

Mr. Margolis: Your Honor please, at this time we would like to offer the omitted portion on page 1 of Government's Exhibit 310.

The Court: You do not want the other part?

Mr. Margolis: I am not necessarily offering it.

The Court: Very well. Admitted.

The Clerk: KK.

(The document referred to was received in evidence and marked Defendants' Exhibit KK.)

Mr. Margolis: Ladies and gentlemen of the jury, I want to read to you from what has been Government's Exhibit 310, the portion which is now admitted in evidence as Defendants' Exhibit KK, which is the strike committee meeting at Newport Beach, Thursday, June 6, 1946. I believe the [3142] rest of the exhibit has been read to you so I will just read the omitted portion.

(At this point counsel read Defendants' Exhibit KK to the jury.)

Direct Examination

(Continued)

By Mr. Margolis:

Q. Mr. McLauchlan, are those letters to which you testified asking for the support of these people on strike?

The Witness: Well, I am trying to remember. I am not just sure whether they were the [3143] same or a different letter because the previous reference——

(Testimony of Charles McLauchlan.)

Q. What is your best recollection as to what that refers to?

A. It was a letter mailed to all the members on the boats in Newport Beach, some of which at that particular time of the year had not yet started to fish, and we wanted to contact every member——

The Court: No. What did the letter say? [3144]
That latter may be stricken. What did the letter say?

The Witness: It said in general——

The Court: The same thing you have heretofore described?

The Witness: I think that must be true.

The Court: Very well.

Q. (By Mr. Margolis): Now I want to direct your attention to Government's Exhibit 311, which is a set of minutes dated June 7, 1946. These are Newport Beach minutes, are they not?

A. Yes.

Q. And particularly to that portion on page 1, "Moved and seconded that a committee of three men contact all men who are unfair before final action. Carried." I want to ask you whether the final action that is referred to there is again the final action of declaring them unfair. [3145]

* * *

Q. (By Mr. Margolis): What final action is referred to?

A. Was to declare by a vote of the membership that these particular individuals were considered unfair by the union. And until that was done——

(Testimony of Charles McLauchlan.)

The Court: Well, is that the final action?

The Witness: Yes.

The Court: All right. You have answered it.

Q. (By Mr. Margolis): Were they officially considered unfair, regardless of whether their actions were unfair, before they were put on the unfair list?

A. No, that is the main point. [3147]

Q. I want to direct your attention now, Mr. McLauchlan, to Government's Exhibit 312, being the strike committee minutes for Newport Beach of June 8, 1946, and particularly to that portion on page 2 reading: "Publicity committee report none. Moved, seconded that the publicity committee draw up another letter or circular for the press, public, and information and businessmen——"

Mr. Rubin: I think that is "unfair" instead of "information," counsel, if I may interpolate.

Mr. Margolis: That is right.

Q. (Continuing) "Moved, seconded that the publicity committee draw up another letter or circular for the press, public, and unfair markets and businessmen in Newport." I think this says "Carried," is that right? A. Carried, yes.

Q. I want to ask you if you have a publicity committee which functioned all through the month of June, 1946. A. That's true.

Q. What functions did that publicity committee carry on?

A. This sort of thing that is in this paragraph. That is, giving information to the press, to the pub-

(Testimony of Charles McLauchlan.)

lie, to any section of the public, including businessmen in the town, people dependent upon the fishing fleet and its welfare and so forth. [3148]

Q. Concerning what?

A. Concerning the situation that brought about the strike. And the attitude and desires and needs of the union.

Q. Did you give publicity concerning the strike itself and the actions you were taking?

A. That's right.

The Court: This said, "Unfair businessmen?"

The Witness: Unfair markets.

Mr. Margolis: Unfair markets.

The Court: Unfair markets and businessmen.

The Witness: That didn't mean unfair businessmen, because no businessmen were unfair.

Q. (By Mr. Margolis): I want to refer to page 3 of the same set of minutes. "Motion moved, seconded, that picket line be streamlined in the case of albacore and that hired pickets or volunteers be used. This motion is a recommendation. Carried." I want to ask you what was the situation during the month of June, 1946 with regard to albacore fishing?

A. The albacore started to get on the lines about a month early.

Q. What do you mean by "get on the lines?"

A. Well, it has always been the practice of the fishermen along about when they think albacore are going to start to hit, to go out on prospecting trips, you might say—well, here some people

(Testimony of Charles McLauchlan.)

just happened to be out a way early and they [3149] began to catch albacore.

Q. Came in about a month early and what happened with regard to what the fishermen did at that time?

A. The albacore are the main resource of the small boat fleet, and when the albacore hit nothing can hold them, nothing can hold the fishermen, they go albacore fishing, even if their boats aren't finished they go albacore fishing.

Q. Is that what happened during the month of June? A. That's right. [3150]

* * *

Q. (By Mr. Margolis): I show you a one-page mimeographed sheet, mimeographed on both sides and addressed on one side "To the Public" and purporting to bear the signature of Charles McLauchlan, business manager, IFAWA, Local 36, Newport Unit, and ask you whether you recognize that. A. I do.

Q. What is that?

A. This is the letter mentioned in the minutes which was duly drawn up and mimeographed by the publicity committee.

Q. The one that you mentioned previously in your testimony? A. Yes, sir.

The Court: This morning? The one that was handed to people who went through the lines, or the one that was sent to the small boat owners?

The Witness: This is the one that was, according to the testimony just now, just finished, the

(Testimony of Charles McLauchlan.)

minutes about the publicity committee shall draw up a letter to the public, unfair markets and businessmen.

Mr. Margolis: I ask that this be marked for identification and then I will offer it in evidence, your Honor. The Clerk: LL.

(The document referred to was marked Defendants' Exhibit LL for identification.) [3151]

Mr. Rubin: Usual objection, that it is self-serving, your Honor.

The Court: Let me see the minutes that this refers to.

(The document referred to was passed to the Court.)

The Court: What is your objection?

Mr. Rubin: The objection was that it is self-serving, if your Honor please.

The Court: Well, I think that it is admissible as explanatory of the document that is now in evidence. Objection overruled.

(The document referred to was received in evidence and marked Defendant's Exhibit LL.)

Mr. Margolis: This exhibit which has been marked LL is a mimeographed sheet, mimeographed on both sides, which reads as follows:

(At this point counsel read Defendants' Exhibit LL to the jury.)

Q. (By Mr. Margolis): Just a brief reference to Government's Exhibit 313, Mr. McLauchlan,

(Testimony of Charles McLauchlan.)

which is the strike committee meeting dated June 11, 1946, the portion which is in evidence as Defendants' Exhibit T, "Discussion and reading of the proposal tentatively accepted by the San Pedro dealers. General discussion on the merits of the proposal." I want to ask you whether or not that refers to the letter of June 11, 1946 addressed [3152] to the fresh fish dealers of the port of San Pedro which is in the evidence as Defendants' Exhibit A.

A. It does.

Q. Now I want to direct your attention to Government's Exhibit 317, which are the minutes of June 20, 1946 for Newport Beach, and particularly to that portion on page 1 of that exhibit which reads, "Assigning men as patrolmen. Very good results being obtained." Was there a difference between pickets and patrolmen?

A. Yes, there was.

Q. Will you explain what the difference was, what a patrolman did?

A. Well, the patrolmen were our emissaries to fishermen who had not yet come into the office and been registered. The patrolmen were assigned for certain hours, maybe three hours, instead of picket duty, to go to a certain section of the bay and to talk to the fishermen that they found working on their boats or tying up or cleaning up their boats, and explaining to them the issues in the strike and asking them for their cooperation, and if they agreed to cooperate to come over and register with the strike committee.

(Testimony of Charles McLauchlan.)

Q. And that was referred to in those minutes as patrolmen? A. That is correct. [3153]

* * *

Q. (By Mr. Margolis): Now, I will direct your attention to page 3, near the top of the page, of these minutes, where it says, "Report on Mooring Committee"—incidentally, these are the minutes, are they not, of June 24, 1946 for the Newport Beach unit?

* * *

A. Yes, these are the minutes.

* * *

Q. (By Mr. Margolis): "Buckman gave his report. Says the city has received permission for the mooring basin proposed off of 19th Street. Said city engineer wanted some technical data on how to moor boats. McLauchlan gave his report. Said they looked around and found several places that may do temporarily, but problems came up that were insurmountable. We may notify harbormaster of moorings available by owners' absences." Does that set forth completely the substance of what was said in that report?

A. As it is written it is not understandable in certain parts. [3155]

Q. Will you tell us what was said on that subject?

* * *

A. We had a lot of trouble in the Newport Harbor trying to find a place to moor the boats of the fishermen, and one of the things we tried to do, to

(Testimony of Charles McLauchlan.)

sort of alleviate this somewhat, was to find, if possible, areas that were suitable for mooring areas which were not being used. So looking at a chart of the harbor we saw several such corners, and I had the job of going to see city officials and property owners, or whatever, to see if there was a possibility of their being used by fishing boats. And it says here that problems came up which were insurmountable. These insurmountable problems were the fact that the property owners didn't want fishing boats around. They wanted these beautiful yachts with nice painted hulls and flapping sails, but a working boat for a man and his family to make a living, they didn't want to have around.

Mr. Rubin: If your Honor please, we are [3156] in another speech again, and we submit it should be stricken.

The Court: Yes, it is wholly immaterial.

The Witness: This is what I said in my report.

Mr. Rubin: Even if he said it it is immaterial.

The Court: It is immaterial.

Mr. Margolis: The government offered a lot of immaterial evidence, and if——

The Court: Certainly a lot of immaterial evidence has gotten into this record, and it is my fault. I should have been a little firmer and tougher at the beginning than I have been. However, that is immaterial. The jury is instructed to disregard it. It is stricken from the record.

Q. (By Mr. Margolis): I want to refer to Government's Exhibit 320, which is the strike committee minutes for June 28, 1946 in Newport Beach,

(Testimony of Charles McLauchlan.)

and the portion on page 1 which reads "Passed out circular to all sport fisherman companies,"—is that what it says? A. Yes, that is what it says.

Q. "Passed out circular to all sport fisherman companies. Had good reception." Will you look at those minutes in order to refresh your recollection, and tell us if you know what that referred to?

A. Yes, this is the reference—in the mackerel fleet and belonging to the union we have a number of fishermen, especially during the spring [3157] and summer months, who work on what is known as sport fishing boats.

Q. What are these sport fishing boats?

A. The sport fishing boats take out people for fun, they charge them so much a day, and they go out here and there with a group of from ten to forty amateurs, you might say, amateur fishermen. Others charter the boat, may a group of five charters a boat and goes out and spends the day. Those are the two types. The crews on these sport fishermen operate the engines and care for the welfare of the passengers and navigate the boat, and I think they cook for the passengers and clean the fish and so forth. So these men who are the summertime crews on sport fishing boats fish mackerel in the winter, and we wanted their co-operation to explain to all the people who go out on the sport fishing boats what we were after.

Q. Incidentally, is it the practice for any of this fish which is caught on the sport fishermen boat or sport fishing boat to be sold to the fresh market dealers?

(Testimony of Charles McLauchlan.)

A. That has happened many times, and that was another point in the co-operation— [3158]

* * *

Mr. Margolis: If your Honor please, I would like to offer in evidence the omitted portion of this exhibit, that is, Exhibit 320, which is on page 2 thereof.

* * *

The Court: I do not know that it would raise collateral issues. From reading it, it looks like it ties into the same general situation. The motion is denied. It is admitted in evidence.

The Clerk: MM.

(The document referred to was received in evidence and marked Defendants' Exhibit MM.)

Mr. Margolis: Ladies and gentlemen of the jury, this is the strike committee meeting minutes of Newport Beach, June 28, 1946, originally offered by the Government as Exhibit 320 and the portion now offered by the defendants is MM and reads as follows:

(At this point counsel read Defendants' Exhibit MM to the jury.)

Q. (By Mr. Margolis): Do you know who is referred to there? [3160]

* * *

A. That is right.

(Testimony of Charles McLauchlan.)

Q. This Mr. Negri was the owner of a boat?

A. He was a man who leased a barge, or chartered a barge.

Q. What did that barge do?

A. That barge as towed into Mexican waters about two days' or three days' journey down, it was anchored there with ice aboard, other boats journeyed from San Diego down and back carrying to the barge ice, supplies, gasoline, and carrying back albacore which were purchased on the barge from small boat fishermen whose home port was San Diego, that is, who cleared out of San Diego, and who hoped to stay in the vicinity of the barge all season without coming back, the long voyage each time they caught a hold full of fish.

Q. Now do you recall this discussion at the meeting of June 28, 1946 with regard to putting a weighmaster, a CIO weighmaster, on the Victor Negri barge?

A. I do.

Q. And was a CIO weighmaster later to be put on the barge?

A. He was.

Q. Do you know what the function of that weighmaster was?

A. The function of the weighmaster was to watch the scales and to see that fishermen belonging, especially to our unit but in general all [3161] fishermen, received honest weights. In fact, he took with him a check weight so he could check the scales.

He also checked the figures of the computations because some of our fishermen do not figure too well, so we thought that was a service for the membership.

(Testimony of Charles McLauchlan.)

The Court: Was that fresh fish, the albacore that was brought up from San Diego, or cannery fish? The Witness: Albacore is both.

The Court: Was that fresh fish that came from that barge, or do you know?

The Witness: It is my——

The Court: Do you know?

The Witness: I mostly know.

The Court: There are too many people in the world like that, which means they don't know.

Mr. Margolis: Your Honor, I want to cite that—

The Court: That certainly is not any profession of knowledge.

Mr. Margolis: That is an unfair characterization of a witness who is trying to tell your Honor what his state of mind is with regard to these matters, and I think your Honor should instruct the jury to disregard that statement.

The Court: No, the jury are not instructed to disregard it. "I mostly know" is a complete lack of knowledge. I asked the witness if he [3162] knows and he can answer the question whether he knows or he does not know.

Mr. Margolis: I want to cite those remarks of your Honor as misconduct.

The Court: You may do so.

Mr. Margolis: And request that the jury be instructed to disregard them.

The Court: Your request is denied.

Mr. Rubin: Now we are going to move that this

(Testimony of Charles McLauchlan.)

testimony be stricken on the ground that it is not apparent that this fish has anything to do with this case at all.

The Court: The motion is granted and the jury are instructed to disregard the entire testimony concerning the barge in the Mexican waters.

Q. (By Mr. Margolis): Mr. McLauchlan, I want to direct your attention to Government's Exhibit 37, which is a letter which purports to bear your signature. Does that bear your signature?

A. Yes, sir.

Q. And that letter was sent out on June 29, 1946 to the Bayside Fish Market?

A. That is right.

Q. Was that letter sent out to any other concerns other than the Bayside Fish Market?

A. No. [3164]

Q. Now there is a letter that was enclosed in that letter, which I believe in Defendants' Exhibit W-2, is it not?

Mr. Rubin: It is a mimeographed letter to the San Pedro dealers, counsel, whatever the number is.

Mr. Margolis: W-2.

Mr. Rubin: We will so stipulate.

Q. (By Mr. Margolis): That letter was enclosed with this letter, is that right, with this letter which is Government's Exhibit 37?

A. Now they both were sent to the Bayside Fish Market. I am not certain that they were sent in the same enclosure. It may be that the other one preceded this one by a day, or maybe they were

(Testimony of Charles McLauchlan.)

taken there by some of our people one day and the next, or maybe both on the same day.

Q. In any event, both letters went to the Bay-side Fish Market? A. Yes.

Q. The only other market that you had that was picketed during the strike was Horman, is that right? A. Horman, yes.

Q. Horman did not get a copy of Defendants' Exhibit 37? A. He did not.

Q. Did he get a copy of the other letter? [3164]
The Court: W-2.

Mr. Rubin: If the Court please, for the purpose of the record it is W-1.

The Witness: I am not certain.

Q. (By Mr. Margolis): You are not certain whether he did or not? A. No.

Q. Now was this letter, Government's Exhibit 37, ever approved by the Newport unit of the Fishermen's Union?

A. Well, as I remember, this letter was drawn up by the strike committee of the Newport unit.

The Court: Have you answered the question?

The Witness: Yes, sir.

The Court: Read the question again, Mr. Reporter.

* * *

The Witness: Well, I think by the time we had a membership meeting a number of other things had happened so that this particular action never as acted upon by a membership meeting. [3165]

(Testimony of Charles McLauchlan.)

The Court: Do I understand your answer to the question to be that it was not approved by the Newport unit then, or is that your recollection, that it wasn't approved by the Newport unit?

The Witness: I think that would be a fair statement.

The Court: What?

The Witness: That it was not acted upon by the Newport unit.

Mr. Rubin: Counsel's question, if the Court please, was whether it was approved. We object to this on the ground it is calling for a conclusion of this witness. He can testify whether it was passed upon.

The Court: He said it was not acted upon by the Newport unit.

Mr. Rubin: The question was whether it was approved.

The Court: He has answered. It was not acted upon. If it wasn't acted upon it wasn't approved.

Mr. Rubin: That doesn't necessarily follow because this is from a strike committee which was set up and which sent that letter.

The Court: You can find that out on cross examination.

Q. (By Mr. Margolis): Was any action taken pursuant to that letter with regard to declaring boats unfair at any time? [3166]

* * *

The Witness: No. The answer is no.

(Testimony of Charles McLauchlan.)

Q. (By Mr. Margolis): Do you know of any situation in which any boat which wanted to deliver fish to the Bayside Market, the concern to which that letter was addressed, was prevented or interfered with by any action of the union from delivering that fish?

* * *

The Court: You understand it?

The Witness: I understand it and I can answer it.

No boat was ever prevented from unloading fish to the Bayside Market and no boat was ever interfered with from unloading fish or any fish products at the Bayside Market, period.

Mr. Rubin: All right. We will move to strike that, if your Honor please, on the ground it is self-serving, and it calls for a conclusion of the witness as to what was prevented or not prevented.

The Court: It is a conclusion, and it is stricken from the record. The jury is instructed to disregard the witness' answer.

* * *

The Court: It is for the jury to determine whether or not boats were interfered with.

Q. Was any action taken by the union with regard to boats which were delivering fish at the Bayside Market either before or after this letter, other than the cases which you have stated in which boats were declared unfair, was any other action whatsoever taken?

A. At no time.

* * *

(Testimony of Charles McLauchlan.)

Cross-Examination

By Mr. Dixon:

Q. During the course of the strike at Newport do you remember whether a non-member fisherman endeavored to deliver some sardines to Mr. Naylor, do you recall that incident, Mr. McLauchlan? [3169]

* * *

The Witness: And I do not—I will say this: I think that Mr. Jones on—I forget the boat now—but I think that he, you might say, endeavored to deliver some fish to Mr. Naylor.

Q. (By Mr. Dixon): And it is a fact, is it not, that he did not deliver the sardines in his boat to Mr. Naylor during the strike?

A. He did not even tie up at Mr. Naylor's dock with the sardines.

Q. And it is a fact, is it not, Mr. McLaughlan, that you as a contact committee, or a member of that committee, contacted him and asked him not to deliver the sardines to Mr. Naylor, isn't that correct?

A. You might say I did ask him not to, yes.

Q. Mr. McLaughlan, I believe you testified that you took up the business of commercial fisherman in July of 1944, [3170] is that correct?

A. Previous to that, you might say, in the capacity of helping to build a fishing boat, maybe I was additionally working two months.

Q. That was the first time, was it, that you had anything to do with the fishing business or the business of catching fish, that is, July, 1944?

A. Thereabouts.

(Testimony of Charles McLauchlan.)

Q. What were you doing prior to that time? That is, what was your business or occupation?

A. I was a shipyard worker.

Q. During what period of time did you work in the shipyards?

A. For the period of, I would say, from 1942.

Q. To July of '44?

A. Not quite to July. Probably till February or March of '44.

Q. What did you do in the interim period, February, 1944, to July, 1944, when you started to go in the fishing business?

A. Well, as I explained, a couple of months I was working preparing this boat to fish.

Q. That is the one you bought?

A. I had bought no boat ever.

Q. Were you working gratis on a boat; were you, preparing it? [3171]

A. Not gratis.

Q. Did you receive any pay for the work that you were doing working on that boat during that period of time?

* * *

The Witness: I did not receive any wages.

Q. (By Mr. Dixon): Did you receive any money for the work you did on the boat during that period of time from anybody? A. No.

Q. Was this the boat you went out in subsequently and did some fishing on?

A. That's right.

(Testimony of Charles McLauchlan.)

Q. Prior to the time you worked in the ship-yards what was your business or occupation?

A. I worked as a piledriver man. [3172]

Q. For what concern or concerns?

* * *

A. I worked as a pile-driver man for a number of contractors.

Q. How long were you in that position, or how long did you do that kind of work?

A. I think two years, roughly speaking.

Q. For just the same concern?

A. No; I said for a number of contractors.

Q. For a number of different concerns. I believe you testified that you became the business agent of the Newport Beach unit in September of 1945; that is correct, it is? A. Yes. [3173]

Q. And that you retained that position until November of '46? A. That's correct.

Q. And from there you went into the bee business, is that correct?

A. From there I became a full-time defendant in this court.

Q. What business or occupation——

The Court: What is that,—November, 1946?

The Witness: I am mistaken, your Honor. I didn't become a full-time defendant in this court at that time. I didn't go in the bee business at that time.

The Court: Mr. McLauchlan, the fact is that you have been excused from time to time, upon the

(Testimony of Charles McLauchlan.)

special request of your counsel to this court, since this trial has been commenced and the evidence has been put on, haven't you?

The Witness: For a period of a month or so I was here every day, your Honor, that is what I was referring to.

The Court: I see.

The Witness: Now, from November I was unemployed for some time. There was no fishing going on.

Q. (By Mr. Dixon): And you are in business on your own behalf at the present time?

A. Yes, sir.

Q. You were on the committee, were you not, that [3174] presented the stabilization contract to Mr. Naylor in May of 1946?

A. Yes, sir.

Q. And that contract was presented to how many other dealers at Newport at that time?

A. It was presented to—do you want the number or enumeration?

Q. How many other dealers did you present it to at the time that you presented it to Mr. Naylor?

A. We presented it to one, two—well, you mean in that period, not at the same time? You mean in that period?

Q. Withdraw that. The contract was presented to Mr. Naylor in May, latter part of May, 1946, was it not?

A. That is correct.

Q. And the same contract, Exhibit 3, was presented to another dealer at Newport Beach at the same time by yourself and other members of the committee, was it not?

(Testimony of Charles McLauchlan.)

A. Well, a day or two before——

Q. Please answer my question yes or no.

A. A day or two before——

Q. Just answer my question whether you did or didn't please.

A. Well, the same day?

Q. Did you understand my question, Mr. McLauchlan?

Mr. Margolis: If your Honor please, I object to this as argumentative. [3175]

The Court: It is not argumentative, counsel. The witness if he doesn't understand the question he can state so, and I will sustain an objection on that ground. But counsel has a right to ask him if he understands it. The witness is taking his time, he is very deliberate in answering questions, very careful in weighing his answers.

Read the question.

(The question referred to was read by the reporter as follows:

“And the same contract, Exhibit 3, was presented to another dealer at Newport Beach at the same time by yourself and other members of the committee, was it not?”)

The Witness: I do not understand.

The Court: You don't understand that question?

The Witness: I do not understand the term “same time.”

The Court: Wait a minute.

The Witness: It he means——

(Testimony of Charles McLauchlan.)

The Court: Just a minute. You say you don't understand the term "same time"?

The Witness: That is correct.

Q. (By Mr. Dixon): At about the same time, then, Mr. McLauchlan. Does that help you any?

A. Somewhat.

Q. All right. Now, can you answer my question?

A. We presented the contract to four other concerns at about the same time.

Q. And will you name those concerns, please?

A. The Commercial Fishermen's Co-operative Association, the John P. Harmon Company, the Larry Fisher Fish Company, and there was another concern which was just starting to buy market fish to which we presented a contract, but—well, that is the end of the answer.

Q. And it is a fact, is it not, that some of those dealers to whom you presented the contract signed the contract?

A. That is true.

Q. It is also a fact, is it not, that two of the concerns mentioned to whom this contract was presented did not sign the contract, is that correct?

A. That is correct.

Q. And will you tell the jury which companies those were that didn't sign the contract?

A. The Bayside Fish Company, and the John P. Harmon Fish Company.

Q. You were present, were you not, at a meeting of the Joint Executive Committee of Local 36 held on May 25, 1946?

A. I am not sure of any date. [3177]

(Testimony of Charles McLauchlan.)

Q. Well, do you recall whether you were present at a meeting at any time the latter part of May, 1946, at which it was moved, seconded and carried that all dealers signing our agreement shall be allowed to accept fish providing that each one signing agrees that he will not deliver any fish bought from us to any dealer not signed with us?

* * *

A. I remember.

Q. And it is a fact, is it not, that that action was taken by the Joint Executive Committee meeting on or about the date mentioned, namely, May 25, 1946?

A. I am not certain of that. [3178]

Q. If that were in the minutes of the meeting purporting to have been held at that time, would you say that that action was taken at that meeting?

A. If I saw the minutes, I might.

Q. Now in Newport after the strike began these nonstriking dealers were picketed by members of Local 36, were they not?

A. That is correct.

Q. And the signing companies, that is, the companies that you have referred to that signed the contract, Exhibit 3, were not picketed, were they?

A. That is correct.

Q. And it is a fact, is it not, Mr. McLauchlan, that in accordance with the action that I have just mentioned, which was taken by the joint executive committee of Local 36 on May 25, you thereafter notified the San Pedro units that some of their dealers, that is, the San Pedro dealers, were report-

(Testimony of Charles McLauchlan.)

ed trying to sell fish to these two markets that you were picketing in Newport Beach?

* * *

A. That is not a fact.

Q. Did you ever notify Mr. Morkowski to that effect? A. He is not in San Pedro.

Q. I am sorry. I meant San Diego. Did you take such [3179] action with reference to notifying Mr. Morkowski in San Diego with reference to the dealers there? A. Correct.

* * *

Q. And you did send this telegram to Mr. Morkowski, dated June 3, 1946, Government's Exhibit 503, did you not? A. I did.

Q. Which reads as follows:

"Your dealers reported trying to sell fish to unfair markets in Newport Beach. Please inform them Bayside Fish Market and John Harmon unfair. Will call you Tuesday morning for better communications."

And it is a fact, is it not, Mr. McLauchlan, that on June 6 all ports, San Diego, San Pedro, Redondo, Santa Monica, Morro Bay and other necessary ports were notified by or through you and Local 36 that Bayside Market and John Harmon were unfair, as you call it?

A. Well, I am not sure that I notified them or that it was through me, but I am sure they were notified.

Q. That you are sure of? A. Yes. [3180]

* * *

(The jury retired from the courtroom at 3:15 o'clock p.m.)

The Court: Has your document arrived?

Mr. Kenny: Yes.

The Court: You have handed government counsel a copy?

Mr. Kenny: Yes. This is an offer of proof of the witness Dr. John B. Schneider.

The Court: And it is stipulated that the offer is made as if the witness were sworn and on the stand?

Mr. Rubin: So stipulated, your Honor.

The Court: And the appropriated questions asked him to provoke the responses set forth in this document?

Mr. Rubin: Yes, your Honor.

* * *

OFFERS OF PROOF

Mr. Margolis: We have certain other offers of proof that we might get out of the way at this time, your Honor.

Mr. Kenny: Would that be given a number, or how are we doing it?

The Court: What was the number of the other one?

The Clerk: GG.

Mr. Kenny: That would be GG-1.

(The document referred to was marked Defendants' Exhibit GG-1 for identification.)

Mr. Margolis: With regard to the offer I want to make in a few minutes, I could put questions to the witness that would be proper in order to lay the foundation because your Honor ruled previously, and I assume the offer would be made as though the questions had been asked.

Mr. Rubin: We have no objection to the form, if that is what counsel wants.

Mr. Andersen: We have one here that we would ask be marked.

The Clerk: GG-2.

(The document referred to was marked Defendants' Exhibit GG-2 for identification.)

The Court: This is made on the same basis as if the witness were on the stand, sworn and questions were asked that would elicit these answers?

* * *

The Court: It is GG-2.

Mr. Andersen: And purports to be a statement showing the average earnings of fishermen at Newport Beach.

* * *

Mr. Margolis: Now with regard to the witness Robert M. Phelps, we offer to prove that when he started fishing in 1934 that for the first few years thereafter he did not earn in excess of \$1000 a year from full-time fishing efforts;

That since 1934 and up to the present time he has never in any year earned in excess of the amount of \$2000;

That his maximum earnings have been slightly less than \$2000 in any one year.

For these earnings he has fished on the average of nine months a year full time and spent about two or three months working on a boat, working on repairing a boat, for which he received no extra compensation.

I offer to prove by this witness that he has no property except a little fishing gear; no car; no life insurance. And we offer to prove, with regard to him and all the other fishermen, that they carry no insurance on their boats because they are unable to afford it.

Mr. Dixon: Is that true with reference to Mr. Knowlton?

Mr. Margolis: Mr. Knowlton too, it is my understanding, carries no insurance.

* * *

Mr. Margolis: I offer to prove further, with regard to Mr. Phelps, that the boat he was working on was sunk this year and that he and five other fishermen were picked up by a purse seiner; that he lost all of his papers, clothes and records, and that is the reason that he cannot give his exact earnings, because he had records of his exact earnings, but that he knows that his earnings were not in excess of \$2000 in any one year.

We do have his exact earnings, and we offer to prove his exact earnings, for the years 1945 and 1946 as being, total earnings of \$1723 for 1945 and \$1016 for 1946. During neither of these years did he own his own boat, but during the year he owned his own boat he never made more than \$2000.

With regard to the defendant McComas, we offer to prove that if allowed to ask appropriate questions that in 1942, the first year that he fished commercially, he earned a little less than \$2000;

That since then his earnings have been below the amount of his earnings for the first year, and for the last two years he hasn't made enough money to pay any income tax.

In 1943 his earnings were about \$1200; in 1944 about \$1,800.

With regard to the defendant McLauchlan, we offer to prove that during the time that he was a fisherman he lived in a trailer for most of that period, for which trailer he paid \$175, because he was unable to obtain or afford a home in which to live; that his entire other property is a 1937 Graham automobile; and that he owns nothing else.

Also that his earnings during the time that he fished averaged approximately \$100 a month, except for three or four months when he fished abalone, during which months his earnings averaged slightly in excess of \$125 a month.

That is all.

The Court: It seems to me as though you are offering all that evidence in the wrong form. It might be appropriate before a congressional committee, but I do not think it is material here.

Mr. Margolis: It goes to the question we have already argued.

The Court: That is right.

Transcript of Testimony
(Resumed)

Mr. Rubin: Just for the purpose of the record, your Honor, we object to the oral offer just made on the ground of immateriality and at the same time we will object to Defendants' Exhibit GG-2, the average earnings of fishermen on the same ground. [3181]

* * *

Mr. Margolis: We have talked to government counsel about a witness we have here from the Fish and Wild Life Service who we would like to put on the stand and permit to leave.

The Court: Out of order?

Mr. Margolis: Yes. Government counsel say they have no objection.

The Court: Surely.

Mr. Margolis: Mr. Hinkle.

HARRY B. HINKLE

called as a witness by and on behalf of the defendants having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Margolis: .

Q. Mr. Hinkle, you are connected with the Fish and Wild Life Service of the Department of the Interior? A. That's right.

Q. In what capacity? [3183]

A. I am in charge of the Market News Office.

The Court: Of the what?

(Testimony of Harry B. Hinkle.)

The Witness: Market News Office.

Q. (By Mr. Margolis): Is that the Market News office in San Pedro?

A. At San Pedro, yes.

Q. How long have you worked for that agency in that capacity?

A. In that capacity since August 1, 1945.

Q. And prior to that time?

A. Prior to that, since May 2, 1942 with the Fish and Wild Life Service in Washington, D. C.

Q. In other capacities?

A. In other capacities, yes.

Q. Were your capacities in Washington with relation to marketing problems?

A. Yes, I was hired in the first place for work with the market development section, at that time headed by Mr. Russell.

Q. Now you are out here in San Pedro doing the work that you have indicated?

A. Yes, sir.

Q. In the year 1946, during the months of April and May, did you attend any conferences with relation to the problems of marketing fresh fish in this area? [3184]

A. I attended several meetings devoted to the promotion of the sale of fish, yes.

Q. When was the first of those meetings held?

A. The first of those meetings was held in Los Angeles on, I believe it was, April 22nd.

Q. And where was it held?

A. That meeting was held in the offices of the Central Fish and Oyster.

(Testimony of Harry B. Hinkle.)

Q. It that a wholesale fish company in Los Angeles?

A. That is a wholesale fish company in Los Angeles presided over by Mr. Bevarino.

Q. You mean he is the owner of it, or the manager?

A. At least the manager; yes, sir.

Q. Do you know who called that meeting? Perhaps let me ask you this: How were you invited to that meeting, or did you invite the others to that meeting?

A. I am not certain how that meeting was called, but in the beginning I received a wire from my chief in Washington to proceed to Seattle some time in the early part of April and meet Mr. Russell of the market development section there.

Q. Mr. Russell is your superior?

A. Not at that time he wasn't. He was formerly my superior.

Q. The head of the market development section of the Fish and Wildlife Service?

A. That is right. While there we talked to two or three of the dealers and several of the union officials in Seattle, where this fish promotional work had started, and then proceeded to Los Angeles at which time this meeting was called for April 22nd.

Now I can't recall who called that meeting. It may possibly be that Mr. Russell got in touch with Mr. Woods who was the secretary of the Western Seafood Institute and he called the meeting. [3186]

(Testimony of Harry B. Hinkle.)

Q. What is the Western Seafood Institute that you speak of?

A. Western Seafood Institute was an institute composed of fish dealers in this area.

Q. Wholesale or retail or both?

A. Wholesale dealers.

Q. Who was present at this meeting besides yourself? I am talking about this first meeting.

A. At the first meeting there was Mr. Russell—

Q. That is the Mr. Russell from the Fish and Wildlife Service?

A. Mr. Russell from the Fish and Wildlife Service, Mr. Tendick of the Fish and Wildlife Service, and myself; Jiff Kibre, Gilbert Zafran, and Mr. Crane.

Q. I wonder if you would identify these persons as you go along?

A. Mr. Kiber is——

Q. I think we know who Mr. Kiber and Mr. Zafran are.

A. Mr. Crane at that time was connected with the IFAWA on the newspaper.

Then Mr. Puccinella of the Paladini Seafood and Mr. Bevarino of the Central Fish and Oyster and Mr. Woods, the secretary of the Western Seafood Institute, those were all I can recall that were at that meeting. [3187]

Q. I wonder if you would tell us rather briefly and rather summarize for us what was said by the persons there. Just tell us the gist of what was said.

A. Well, it all related back to the Seattle crowd.

(Testimony of Harry B. Hinkle.)

At that time there was a surplus of rockfish in the northwest area at Astoria and Seattle, due to the fact that a large market had been developed during the war through the armed services. That had fallen off to some extent and there were large cold storage holdings of rockfish, rockfish filets, and at a subsequent meeting at Seattle, at which I did not attend, the union and our service and several of the wholesale dealers in Seattle had gotten together and proposed that the union and the wholesale dealers should be assessed, as I remember it, a quarter of a cent a pound on the fish landed, this money to be used as an advertising fund to promote the sale of the rockfish filets.

Q. Sale to whom? A. To the public.

Q. To the consumer?

A. To the consumer, yes.

Q. All right. Go ahead.

A. And they proposed that this promotional campaign be carried on in Los Angeles because of this being a large metropolitan area and they thought a test campaign could be carried on here and if it was successful they might be able to [3188] carry it on in other cities in the United States.

So we had this meeting, the first meeting, in Los Angeles and discussed the proposal of the Seattle crowd, and at this April 22nd meeting most of those present had thought that the Los Angeles crowd would prefer to put on a campaign to promote the sale of fish to the public on all species of fish rather than rockfish, and that was the general

(Testimony of Harry B. Hinkle.)

theme at that time, and we decided to have a meeting at a later time and invite more of the dealers to be present. [3189]

Q. Was a second meeting held?

A. Yes, a second meeting was held on the 4th of May. Q. 1946?

A. 1946, yes.

Q. And where was that meeting held?

A. That was in the Subway Terminal Building.

Q. Do you know whose office?

A. It was in no office. It was called by—may I use these (indicating)?

Q. Those notes that you have?

A. There are a couple of letters I wrote to Mr. Russell after these meetings, and somewhere here it should have the room number of those buildings.

Q. Those letters were written immediately after the meetings were held?

A. One is written on May 8th and the other on May 13th. Q. All right.

* * *

The Witness: It was in the Subway Terminal Building in an office that was rented by Mr. Woods.

Q. (By Mr. Margolis): Mr. Woods of the—

A. Western Seafood Institute. I see here [3190] that the second meeting was held in Room 438, and I think it was the same room as the first meeting.

Q. Who was present at that second meeting?

A. Well, there was the same group that was present at the first meeting, plus several advertising men, men representing advertising firms, and at the

(Testimony of Harry B. Hinkle.)

second meeting Mr. Russell from our office was not in attendance, he had returned to Washington—or to Chicago, pardon me.

Q. Were there any additional dealers there?

A. The only additional dealer I can recall was Mr. Holbert who was representing Freeman Wholesalers.

Q. That is a fresh fish wholesaler, is that right?

A. Yes.

Q. Is that the largest fresh fish wholesaler in this area?

A. Well, they do a large volume of business. I don't know as they are the largest.

Q. All right. Will you tell us the gist of what was said at the meeting in May?

A. Well, there was some of the same discussion as at the first meeting, but with the exception that at this particular meeting they were attempting to form plans whereby this campaign could be carried on. Some of those present thought that we should decide on what sort of a campaign should be [3191] carried on, and when that was determined the members of the Western Seafood Institute should be assessed an amount of money which would carry on the type of campaign that they thought proper. Others that were present thought that they should do the assessing first to see how much money they could get together for an advertising campaign, and then base their campaign on that particular amount of money.

(Testimony of Harry B. Hinkle.)

Q. What was the end result of the meeting? What action, if any, was taken at this meeting?

A. At that meeting they appointed a committee to study over these proposals and suggested a meeting for a later date, which was, as I recall, May 10th.

Q. Were you a member of that committee?

A. I was a member of that committee, yes.

Q. Was a meeting of that committee held?

A. Yes, that meeting was held on May 10th.

Q. Where was that held and who was present?

A. That was held in the Subway Terminal Building and those in attendance were Mr. Zafran, Mr. Woods, Mr. Puccinelli.

Q. Who was Mr. Puccinelli? Have you identified him previously?

A. I identified him previously as being with Paladini Seafood Company. I think he was the general manager of the Paladini Seafood. And Mr. McLauchlan was there, and Max Freeman, and Mr. Chilton from our Washington office, and [3192] myself; and as guests there were Mr. Neiman, Mr. Portman—pardon me, Mr. Neiman was with the Spencer Curtis Company.

* * *

A. (Continuing) Also present were Mr. Neiman with the Spencer Curtis Company, and a Mr. Portman with the same company, and Mr. Rodriguez with the Pacific Fisherman, that is a fisherman's magazine; Mr. Crane of the IFAWA [3193] at San Pedro; and Lionel Shatz, who was the manager of Paladini Company in San Francisco.

(Testimony of Harry B. Hinkle.)

Q. (By Mr. Margolis): Will you tell us briefly the substance of what was said and done at that meeting?

A. We carried on the same discussions as we did the first two meetings as to promoting the sale of fish in this area to the consumer, and tried to devise a way of doing this. There was some discussion about the raising of money and the hiring of some advertising firm to carry on this campaign, but it all sort of fell through when it was brought up there that they thought that the Western Seafood Institute should carry on the campaign and handle the money and do the promotional work, and it was brought out there that the by-laws of the Institute did not allow them to carry on a campaign of this sort, because they were designed primarily to advise the fish dealers on O. P. A. prices, and so forth, and until they could obtain a quorum of dealers they could not revise the laws of the Institute to include this sort of campaign. And the meeting broke up without much more said, and there was no more done about it. [3194]

Q. Can you tell us briefly what happened to that program subsequently, if anything?

A. I don't understand the question.

Q. Was anything further done? Were any further meetings held or any further action taken in connection with the subject matter of the conference?

A. These three meetings were all that were held.

(Testimony of Harry B. Hinkle.)

Q. Nothing further happened after that?

A. No.

* * *

Q. Do you know whether the prices paid for fish caught in this area by the canneries have been uniform for the past few years?

Mr. Rubin: Objected to as immaterial.

The Court: Objection sustained.

Q. (By Mr. Margolis): Do you know whether the prices paid in Seattle for fresh fish have been uniform and based upon price contracts during the past few years?

Mr. Rubin: Same objection.

The Court: Objection sustained. [3195]

* * *

Cross-Examination

By Mr. Rubin:

Q. Mr. Hinkle, I believe you testified that your subdivision of the Fish and Wildlife Service is called the market development section, is that correct?

A. Not the one I am connected with at the present time.

Q. The one you were connected——

A. The one I was connected with at Washington was at that time called the Economic and Cooperative Marketing Section.

Q. And that was when you were in Washington?

A. That was when I was in Washington; yes.

(Testimony of Harry B. Hinkle.)

Q. But this activity that you were carrying on out here was under the market development section, isn't that correct?

A. Yes. That economic and cooperative marketing section was later divided and made into an economic section and into a marketing development section, two different sections.

Q. And so the activities that you were carrying on out here was the market development section?

A. That is right.

Q. And these discussions and meetings that you had with these people had to do with the sale, [3196] with the promotion of the sale of fish, to the public at large, is that correct?

A. Yes.

Q. It didn't have anything to do with the price which the fishermen were supposed to receive from the buyers at the wharf, did it?

A. No.

* * *

Q. Did it have anything to do with the—well, the members of this committee, this group, was composed of all people interested in the sale of fish throughout the entire area in Southern California, isn't that right?

A. That is right, the dealers, the union and the Government.

The Court: And the advertising man?

The Witness: And the advertising man.

(Testimony of Harry B. Hinkle.)

Q. (By Mr. Rubin): It was a means of exploiting the sale of fish essentially, was that the purpose of the program?

A. Essentially it was designed to sell more fish by helping all those right along the ladder.

Q. And had nothing to do with the stabilization of the fish industry at any particular level [3197] then, is that correct?

A. What do you mean by stabilization of the industry?

Q. Fixing the minimum prices, for example, at any particular level, either from the fishermen to the first buyer, or the first buyer to the wholesaler, the wholesaler to the retailer, or to the consumer?

A. No.

Q. And was anybody excluded from participating in this program? Could anybody who was interested participate?

The Court: As far as you were concerned?

The Witness: Yes, I would say yes.

Q. (By Mr. Rubin): In so far as the Government was concerned? A. Yes.

Q. Was there any formal organization set up for the purpose of selling fish as a result of these conversations? A. No.

Q. Was there any discussion of setting up an organization to sell fish as a result of these discussions with this organization?

A. What type of an organization?

Q. An organization which would sell fish to anybody.

(Testimony of Harry B. Hinkle.)

A. The only organization that would have been set up would have been an advertising organization and possibly a cooperative group of the fishermen and dealers. [3198]

Q. The fishermen and dealers combined, is that correct?

A. To promote the fish, not as selling the fish over the counter or anything like that.

Q. Or selling the fish from the boat to the dock-side? A. No.

Q. Now as I understand your testimony, this idea originated up in Seattle, is that correct, for the purpose of endeavoring to dispose of surplus species of rock bass that had accumulated up there, is that right? A. The rockfish; yes.

Q. Rockfish? A. Yes.

Q. That was up in Seattle?

A. That is right, Seattle and Astoria.

Q. That is where this idea originated?

A. Yes.

Q. Nothing came of that program, you say, at all? A. The end result, no.

Q. And there was no other cooperative endeavor set up except for the purpose of possibly setting up an organization to handle the funds to pay out for advertising? A. That is right.

Q. That is the sum total of what this proposal was to be, is that right? A. Yes. [3199]

CHARLES McLAUHLAN

resumed the stand and testified further as follows:

Cross-Examination

(Continued)

By Mr. Dixon:

Q. Mr. McLauchlan, you were a member of the negotiating committee of Local 36, Newport Beach Unit, were you not? A. That is true.

Q. When were you a party to such a committee?

A. Well, I think it was somewhere around the middle of May.

Q. And continued as a member of that committee, did you, until you resigned as business agent of Local 36, Newport Beach Unit?

A. I think that would be the correct answer, because I never was removed; the committee was never dissolved.

Q. When was this committee formed? Can you tell the jury that?

A. Well, I think that we hadn't had a negotiating committee before that time. Roughly the middle of May 1946. [3200]

Q. And who appointed the members of the committee?

A. I think they were selected at a membership meeting of the unit by nominations.

Q. By nomination?

A. Yes, from the floor.

Q. And the other persons on this committee were Mr. Phelps, Mr. Miller and Mr. Munson, is that correct? A. Not the original committee.

(Testimony of Charles McLauchlan.)

Q. At least they were on the committee at the time you served on it in the month of June, were they not? A. The original committee was——

Q. Were they or were they not, Mr. McLauchlan?

A. They attended some of the meetings later.

Q. Can you answer my question?

The Court: Strike the answer. Read the question, Mr. Reporter.

(The question referred to was read by the reporter as follows:

(“Q. At least they were on the committee at the time you served on it in the month of June, were they not?”)

The Witness: They weren't on the committee at the beginning of the time I served on the committee.

The Court: Strike the answer. Read the question again.

(The question referred to was reread by the reporter as set forth above.) [3201]

* * *

The Witness: I think the latter part they were on the committee, yes.

Q. (By Mr. Dixon): Now, Mr. McLauchlan, as business agent of the Newport unit, you were rather active in the activity of that unit during the strike in June, were you not? A. Yes, sir.

Q. Did you ever issue a clearance card or give a clearance card to any non-members of the union for purposes of permitting them to fish?

A. I don't believe I ever gave anyone a clearance card.

(Testimony of Charles McLauchlan.)

Q. Did you ever have any conversation with Mr. Soudur about his securing a clearance card?

A. I believe that I was sent down to talk to him once.

Q. Did you ever give him a card or were you with him when a card was given him, this clearance card, by the unit?

A. One evening Mr. Soudur came to a meeting of the strike committee——

The Court: Just a minute. Strike the answer. Read the question, Mr. Reporter.

(The question referred to was read by the reporter as set forth above.)

The Court: Do you understand that question?

The Witness: I was at a meeting where he was present. [3202]

The Court: Just a minute. Do you understand the question that was just read to you? Read it again, Mr. Reporter.

(The question referred to was reread by the reporter as set forth above.)

The Witness: No. 1, I did not ever give him a card; No. 2, I was present when he received a card. So I guess I was with him when he received a card.

Q. (By Mr. Dixon): But you didn't give him the card yourself?

A. No, sir.

Q. Did you sign the clearance card yourself?

A. To my best recollection, I don't think so. Now if you have the card——

(Testimony of Charles McLauchlan.)

Q. Did you make a practice of signing any of the clearance cards for the Newport unit?

A. I was not in that department.

The Court: Strike the answer. Read the question.

(The question referred to was read by the reporter as set forth above.)

The Witness: To my recollection I didn't sign any cards.

Q. (By Mr. Dixon): Now in connection with the operation of the strike at Newport, I believe you testified that committees were set up to contact non-cooperating boats, is that correct?

A. That is correct. [3203]

Q. And by non-cooperating boats you mean boats that were either owned or operated by non-members of Local 36, is that correct?

A. No. I can explain it, if he wants.

Q. Did you have any non-cooperative boats which were owned by any members, owned or operated by any members, of your Local 36 at Newport?

A. I don't recollect any.

Q. So that if there were any such boats they would be either owned or operated by non-members of your local unit then. is that correct, Mr. McLauchlan?

A. That is true, but that isn't the whole answer.

The Court: Do you wish to explain your answer?

The Witness: I would like to.

The Court: All right.

(Testimony of Charles McLauchlan.)

The Witness: We had a large number of non-member boats who did cooperate and a small number who did not cooperate.

The Court: That may be stricken. He was talking about the non-cooperating boats.

Q. (By Mr. Dixon): Will you answer the last question, please, Mr. McLauchlan?

Mr. Margolis: I thought he had answered it, your Honor.

The Court: Yes, it was answered. [3204]

Q. (By Mr. Dixon): I will hand you what is marked and noted as Government's Exhibit 33 and ask you if that is your signature on that card.

A. That is, yes, sir.

Q. And is that a clearance card that was used by Local 36, Newport unit, during the strike period?

A. That's right.

Q. And that is your signature, then, on that card?

A. Yes, sir.

Q. And to whom is the card made out?

A. To Morris Souder.

* * *

Q. (By Mr. Dixon): I believe you testified that the issuance of these clearance cards was not within your department, is that right?

A. That is what I said, yes, sir.

The Court: That is what he said, but I struck his answer.

Q. (By Mr. Dixon): On the back of this exhibit, Government's Exhibit 33, there is a notation,

(Testimony of Charles McLauchlan.)

“\$24 due for back picket duty,”—did you make that insertion on the picket card, Mr. McLauchlan, or the clearance card?

A. I am not certain.

Q. Well, I will hand it to you again and ask you if that is your handwriting. [3205]

A. That is my handwriting, yes, sir.

Q. So that you made that writing on the back of Government's Exhibit 33?

A. Yes, sir, I did.

Q. And, Mr. Souder was not a member of your local unit, was he? A. He was not.

Q. During the operation of this strike I believe you mentioned the fact that you had a contact committee to contact these non-cooperating boats, is that correct. A. Yes, sir.

Q. And the members of that committee did, in fact, contact the operators of the boats that were not owned or operated by members of your unit, didn't they?

A. They contacted non-members and members.

Q. All right. I am asking you about non-members now. Wasn't the function of this committee to contact non-members? [3206]

* * *

The Witness: There was a separate committee for each one to be contacted, of his friends.

Q. (By Mr. Dixon): Well, you were on this committee, were you not, Mr. McLauchlan?

A. I was supposed to be on all of the committees, yes, that went to see different people, that's right.

(Testimony of Charles McLauchlan.)

Q. And the strike committee meeting of June 7th took action, moving, seconding, and carrying a motion to the effect that the contact committee contain three union men, but that you must be on the committee, is that correct?

A. That's right.

Q. As business agent of the union was it one of your functions to solicit members and memberships in the union?

A. Yes, sir.

Q. And did this contact committee solicit these non-member boat owners or operators to join the union?

A. Very seldom. In fact, I don't remember our soliciting their membership.

Q. I didn't say "membership"; I said "non-members."

The Court: He has answered it.

Q. I didn't get your answer.

The Court: All he was trying to say was he didn't remember soliciting non-members to take membership.

The Witness: At that time on this committee, no, sir.

Q. (By Mr. Dixon): There was another committee also appointed to act known as the visiting committee, was there not, Mr. McLauchlan?

A. Well, I don't know if it was a separate committee just offhand at this distance.

* * *

Q. (By Mr. Dixon): So that you have no recollection or knowledge of the function or duties of

(Testimony of Charles McLauchlan.)

any so-called visiting committee of your local unit, Newport unit of Local 36? [3208]

* * *

The Witness: Perhaps you can refresh my recollection. It may be that this committee we have been talking about was the visiting committee for all I can remember, because it visited people.

Q. (By Mr. Dixon): Did the contact committee have any name other than the contact committee, to your knowledge?

* * *

The Witness: It may be in different minutes it was called a different name. [3209]

* * *

Q. (By Mr. Dixon): That is not my question.

The Court: The question is whether you know. Do you now know?

The Witness: I am afraid I don't know.

Q. (By Mr. Dixon): At the time the albacore was sighted in June, as you have testified, were you still issuing clearance cards?

A. I personally, or the union?

Q. The union. Was the union still issuing clearance cards to non-members? A. Yes, sir.

* * *

Q. (By Mr. Dixon): During the month of June was there any waiver of the provision set up requiring or relating to the establishment of a clearance card system for non-members of the union? A. No.

Q. I believe you testified——

(Testimony of Charles McLauchlan.)

The Court: Just a minute. From the previous question I thought you were getting at whether a man had to get a clearance to go and catch albacore. Isn't that what you want to know?

Mr. Dixon: Yes.

The Court: Ask him that.

Q. (By Mr. Dixon): When the albacore showed, as you have testified, Mr. McLauchlan, was it necessary for a non-member fisherman to go out and get any clearance card from Local 36 to fish for albacore?

A. A lot of them didn't—

Mr. Margolis: Just a minute. I object to that question on the ground it is ambiguous, and on the ground that the word "necessary" is uncertain and indefinite. Whether it was a union regulation would be one question.

The Court: I think that we all understand what is meant by that: if the union considered it necessary. [3211]

Q. (By Mr. Dixon): What is your answer?

A. A lot of them didn't.

The Court: Strike his answer. Read the question.

(The question referred to was read by the reporter as follows:

"When the albacore showed, as you have testified, Mr. McLauchlan, was it necessary for a non-member fisherman to go out and get any clearance card from Local 36 to fish for albacore?")

The Witness: No.

(Testimony of Charles McLauchlan.)

Q. (By Mr. Dixon): It is a fact, is it not, that your picketing continued, of the two non-signing markets, during the month of June when the albacore were running?

A. That is right.

Q. You testified that a greater volume of fish came in to Newport in June of '46 than ever before. It is a fact, is it not, Mr. McLauchlan, that many of the boats that were fishing out of San Pedro on clearance cards brought their fish to Newport during the month of June, did they not?

A. Correct.

Q. And when they did so their fish were delivered and sold to the signing dealers at the Newport port, were they not?

A. That is correct. [3212]

(The following proceedings were had in the absence of the jury.)

The Court: Your offers of proof GG and GG-1, before the jury comes down, I suppose we had better take those up.

* * *

OFFERS OF PROOF

Does anybody wish to be heard in connection with that?

Mr. Rubin: I don't think our objections are formally in the record. At this time we will object to the offer of proof set forth in Defendants' Exhibits, for identification, GG and GG-1, and each

and every part thereof, on the ground are incompetent, irrelevant and immaterial, not tending to prove or disprove any of the issues of this case; and, further, that they are hearsay, not the best evidence. But essentially on the ground that they are immaterial.

Mr. Margolis: Do I understand the objection is made on the basis of lack of foundation?

Mr. Rubin: No, I didn't—

Mr. Margolis: If it is a question of hearsay, then we are going to put a witness on, your Honor, in order to establish that it is not hearsay. We want to put a witness on.

The Court: One of them is proffered as opinion evidence.

Mr. Margolis: But that doesn't make it subject to the hearsay objection, your Honor.

The Court: It is hearsay.

Mr. Margolis: But not subject to the hearsay objection, your Honor, if a proper foundation is laid.

The Court: That's right, if a proper foundation is laid.

Mr. Margolis: Therefore I assume what counsel means is that our foundation is inadequate to escape the hearsay rule. We feel that we can lay—if our foundation is adequate, then if it is expert testimony the hearsay rule does not apply, your Honor. It may be immaterial or irrelevant, that is another objection.

The Court: I understand your position.

Mr. Rubin: I wish to clarify our objection.

The Court: You say you wish to clarify it?

Mr. Rubin: I want to state that portion of the objection will not go to lack of qualification of the witness.

The Court: That is, the lack of foundation?

Mr. Rubin: Yes, there is no objection on the ground of lack of foundation, let's put it that way.

Mr. Margolis: If your Honor please, I still don't quite understand this, because if there is a hearsay objection I don't know what other basis it can be upon except lack of foundation.

The Court: Well, if it is immaterial and it is not lack of proper subject for opinion evidence, then the hearsay rule applies even though there may be no objection to the hearsay. In other words, a man may be perfectly qualified to express his opinion on a subject, but it may not be an appropriate case for an opinion to be expressed, in which event it would be subject to the objection on the ground that it is hearsay, and I suppose that is the process of your reasoning in connection with it, is it?

Mr. Rubin: Yes. We don't desire—we are not testing the qualification of the person who expresses an opinion.

The Court: I have read both GG and GG-1. I think it is probably true, as defense counsel suggested, many if not most of the things that are touched upon in each of the documents have been heretofore either discussed or proffered in evidence or talked about, or urged that the court take judicial notice of.

The objection is sustained on the ground that each and every and all of the things contained therein

are immaterial and incompetent and irrelevant, and no other ground.

Mr. Margolis: There are some of the matters there which I think might be——

The Court: In long documents like that and put up as they are, in the sequential story you have probably covered things which have already been admitted in evidence.

Mr. Margolis: I mean that some of the matters have not been admitted in evidence, but are, I think, matters which go directly to the evidence put in by the government.

I don't know whether your Honor wants me to point it out to him.

The Court: No. I considered that in connection with that when I was reading them over, and the ruling will stand as it is.

Mr. Kenny: Your Honor, I just want to call your attention to one matter that is new and that is the existence of bargaining associations in the collective marketing field. Dr. Schneider made some study of that and reports on the existence here in this county of sales agencies for milk in Downey and Bellflower, and that is certainly new matter.

The Court: I still think it is immaterial. I think if I had as good an understanding at the commencement of the trial of all the facts involved here, I think we could have shortened the trial. I think I have admitted a great deal of material in the trial which in my view of the law as applicable to this case would not be material, but it is in evidence.

TRANSCRIPT OF PROCEEDINGS

(Resumed)

The Court: I have another matter to bring up. Yesterday morning I received a telephone call from the secretary of the juror Irvin, who stated that he had had a ruptured stomach ulcer during the night and was committed to the hospital. I requested her to get ahold of the juror's doctor, and in this morning's mail I have received this communication on the letterhead of J. K. Johnson, M.D., 9345 Venice Boulevard, Culver City, California.

(Discussion in regard to alternate juror reported but not transcribed.)

The Court: All right. Call the jury down. By the way, in connection with those written offers of proof, I suppose it may be stipulated that they may be filed, without being copied into the transcript of the record?

Mr. Margolis: As long as they are considered as though they were read into the record.

Mr. Dixon: So stipulated, your Honor.

The Court: Very well.

(The jury returned to the court room, and the following proceedings were had in the presence of the jury.)

The Court: We cannot have the usual stipulation this morning. Mr. Irvin's secretary phoned yesterday and said that he had a very severe illness, and this morning I received a letter from his doctor stating the nature of his illness, which was ruptured

stomach ulcers, and he is confined to the hospital and will be for some time. For that reason Juror Irvin is permanently excused, and the clerk will swear juror No. 13, the alternate, Mrs. Brown.

(Alternate Juror, Mrs. Agnes Brown, was sworn.)

The Court: If you will take place No. 3 now and hereafter, Mrs. Brown.

The record will show that the jury as now constituted is present and each of them is present and in their respective places. So far as the defendants are concerned, I suppose the usual stipulation?

Mr. Dixon: So stipulated.

Mr. Rubin: So stipulated, your Honor.

* * *

C. LLOYD MUNSON

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Margolis:

Q. Mr. Munson, you are one of the defendants in this case? A. Yes, sir.

Q. And you are a member of defendant Local 36?

A. I am.

Q. How long have you been a member?

A. I think since 1935 or '36. When it was started, anyway. [3219]

(Testimony of C. Lloyd Munson.)

Q. At that time it wasn't Local 36?

A. No, that is right.

Q. You belonged to the fishermen's organization that existed that preceded Local 36 since about 1935, is that right.

A. That is right.

Q. You started fishing about 1934, commercially?

A. That is right.

Q. What had you done prior to that?

A. I had owned a boat yard, a small boat repair yard.

Q. In 1934 did you buy a boat?

A. Yes, sir.

Q. And that was how big a boat?

A. Thirty-six feet.

Q. What size crew did you ordinarily carry on that boat?

A. Sometimes two, sometimes four men. Sometimes one besides myself, sometimes three besides myself.

Q. According to the kind of fish you were catching and according to the kind of gear you were using?

A. That is right.

Q. And you paid \$640 for that boat?

A. That is right.

Q. \$300 down and \$50 a month, is that right.

A. That is right.

Q. Did you continue to own and work on that boat from [3220] 1934 until 1942?

A. That is right.

Q. At that time you sold the boat, is that right?

A. That is right.

(Testimony of C. Lloyd Munson.)

The Court: What was the name of the boat?

The Witness: The Ben Hur.

Q. (By Mr. Margolis): During the period between 1934 and 1942 when you owned this boat, what kind of fish did you go after, market fish or cannery fish?

A. I think it was about 50-50. I fished swordfish, market fish, and some barracuda, some shark; also cannery fish, mackerel and albacore.

Q. After you sold your boat, what did you do?

A. I worked on a larger boat, commonly called a purse seiner.

Q. When you say you worked on the boat, do you mean that you worked on it on a share basis?

A. That is right.

Q. Did you have any interest in it? A. No.

Q. Did you make more money on the purse seiner or on your own boat?

Mr. Dixon: Object to that, your Honor, as immaterial.

The Court: Objection sustained. [3221]

Q. (By Mr. Margolis): Did you thereafter acquire another boat? A. I did.

Q. Did you build that boat yourself?

A. I did.

Q. When did you build it?

A. In the spring and early summer of 1945, spring and summer of '45.

Q. Did you build it alone, all by yourself?

A. My wife and I built it.

(Testimony of C. Lloyd Munson.)

Q. Incidentally, does your wife go fishing with you sometimes? A. Oh, yes.

Q. When you owned a boat did you spend all of your time fishing on that boat?

A. Either fishing or maintenance.

Q. How much of the year do you spend on maintenance of the boat and the gear?

A. It is rather involved, according to how much gear you use and what type of fishing you do. We probably spent three months of the year in building and rebuilding nets and equipment and maintenance of the boat, and probably nine months fishing.

Q. And the members of your crew spend practically no time on the maintenance of the boat, is that right? [3222]

A. Very little on the maintenance of the boat but they are required to build and repair the equipment.

The Court: That is, the nets?

The Witness: Yes, sir.

The Court: If you use nets.

The Witness: We used nets.

Q. (By Mr. Margolis): During the time that you have been fishing did you ice fish in your boat while you were out fishing? A. Oh, yes.

Q. Ever ice fish when you came back and hold it for a while? A. I tried it once.

Q. When was that?

A. I would say about 1939 or 1940, I believe.

Q. What happened?

(Testimony of C. Lloyd Munson.)

A. I gave them to the Salvation Army.

Q. You iced them for a while and then finally gave the fish to the Salvation Army, is that right?

A. That is right.

* * *

The Court: Cross-examine.

Mr. Dixon: No questions.

The Court: Step down.

* * *

BURT D. LACKYARD

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Margolis:

Q. Mr. Lackyard, you are one of the defendants in this case, are you not? A. I am.

Q. You are a commercial fisherman?

A. That is right.

Q. A member of Local 36?

A. That is right.

Q. You started fishing commercially in about 1942 is that correct [3224] A. Thereabouts.

Q. What did you do before that?

A. I was a painter.

Q. House painter? A. Yes.

Q. When you started fishing did you buy your own boat or did you work for somebody else?

A. No, I started to work for another fellow.

(Testimony of Burt D. Lackyard.)

Q. What kind of a boat?

A. Well, a jig boat in shark fishing.

Q. How big a boat was it?

A. Oh, 40 feet, I think.

Q. How large was the crew? A. Three.

Q. Did you subsequently buy your own boat?

A. I did.

Q. When was that?

A. That was about a year later, about May of 1943 would be about right.

Q. And this was a one-man boat, is that correct, a 26-foot boat? A. That is right.

Q. You paid \$450 for that boat and you still own it, is that correct? A. That is right.

Q. Now since you have been a commercial fisherman, what has been the nature of the fishing operations, that is, have you fished cannery fish or fresh market fish or both?

A. Well, I have fished mostly cannery fish. I have never done too well with fresh fish, mostly due to——

Mr. Rubin: Just a moment, if your Honor please. The question has been answered. The rest of it calls for a conclusion.

The Court: Go ahead. It calls for a conclusion. Go ahead with your next question. Or he started to express his conclusion, rather.

Q. (By Mr. Margolis): When you say you have done very little fresh market fishing, I wonder if you could give us a little bit better idea of how much you have done. Have you done any fresh market fishing since 1942?

(Testimony of Burt D. Lackyard.)

A. I done a little bit in 1945, approximately a month; in 1946 I done none.

Q. Have you done any since 1946?

A. I have done none since '46.

Q. All of your fishing has been cannery fishing?

A. That is right.

Q. When you did go fishing for fresh market fish, did you run into any problems with regard to the disposal of your fish? [3226]

Mr. Rubin: Just a moment. That calls for a conclusion and opinion of the witness. The question is ambiguous and uncertain.

Mr. Margolis: I will withdraw the question.

Q. Where did you sell your fish when you went fishing for fresh market fish?

A. In Newport I generally sold to who I could. I had no regular spot inasmuch as I was a new-comer, but mostly I sold to Bayside.

Q. Did you go fishing regularly and sell fish regularly during the time that you were fishing fresh market fish? A. No, I did not.

Q. What happened?

A. I couldn't always sell the fish.

Q. So you didn't go fishing, is that right.

A. That is right.

Mr. Rubin: Just a moment. We move to strike the answer on the ground it calls for a conclusion and opinion of the witness. He can testify as to whether he sold it. Whether he could or not calls for his conclusion.

The Court: Yes, that is right.

(Testimony of Burt D. Lackyard.)

Q. Did you have any occasion when you offered fish for sale to dealers and they refused to accept it at all? A. Yes.

Q. Did that happen once or more than once?

A. Well, that happened quite often.

Q. Now in addition to your fishing activities, have you engaged since 1942 in any other kind of work?

A. Yes, I have found it necessary to work on the beach.

Mr. Rubin: Just a moment. We object to the question on the ground it is immaterial.

The Court: Objection sustained, the answer is stricken—unless it relates to the union activities.

Mr. Margolis: Well, it relates to what this man did to make a living.

The Court: Then the objection is sustained and the answer is stricken.

Q. (By Mr. Margolis): When you were fishing fresh market fish on your own boat, did you also work on other boats? A. Yes.

Q. Can you tell us what other boats you worked on?

A. Well, I worked on sport fishing boats and one other [3228] boat, Roy Barry, which was a commercial boat, a jig boat at that time.

Q. Was that work done over weekends, is that right? A. Yes, on the sport boats.

Q. And that was in addition to what little fresh market fishing you did? A. That is right.

(Testimony of Burt D. Lackyard.)

The Court: That altogether was only a month since you have engaged in the fishing industry in 1942?

The Witness: Altogether a month?

The Court: I understand that you have only fished fresh market fish for one month since you started in the fishing industry.

The Witness: I fished a little in 1943 and '44 and '45.

The Court: One month in '45?

The Witness: Well, it was approximately a month in '45.

The Court: All right. And not otherwise since?

The Witness: I haven't fished since only—well, I have fished since I have been up here a little, but not to do any good. [3229]

Q. (By Mr. Margolis): What fish did you sell—did you sell any fresh market fish during the period that OPA was in effect?

A. That is when I sold most of my fish.

Q. Did you always get OPA prices for it?

Mr. Rubin: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Q. (By Mr. Margolis): When you went to sell your fish, will you tell us how the price for the fish was set?

Mr. Rubin: Same objection, your Honor.

The Court: Objection sustained.

Q. (By Mr. Margolis): Will you tell us what

(Testimony of Burt D. Lackyard.)

practice you followed when you brought in a load of fresh fish with regard to disposing of the fish?

A. Well, generally go to the first market which I favored, Bayside, and if he would take my fish, O. K.; if not, I would go to another one, until I sold my fish.

Q. When you say "if he would take" your fish, what happened when you went to see him? What was the practice?

A. "Don't want any more fish. Can't take them."

Q. When he did take the fish what was the practice with regard to the sale of the fish?

A. I says, "How much are you paying for fish?" Whatever he said is what I took. [3230]

* * *

Cross-Examination

By Mr. Dixon:

Q. Mr. Lackyard, it is a fact, is it not, that when you went out fish in in your own boat that no one told you when to go fishing? A. Not directly.

Q. Did anyone tell you where to go fishing when you decided to go fishing in your own boat for fresh market fish? A. Not directly.

Q. That was a matter entirely within your own choice, was it, Mr. Lackyard, as to where you would go fishing in your own boat?

A. I wouldn't say no nor yes. We went where the fish were.

Q. I understand. That is all.

* * *

ARTHUR D. HILL

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Margolis:

Q. Mr. Hill, you are one of the defendants in this case? A. I am.

Q. You are a member of Local 36?

A. Yes.

Q. You are a commercial fisherman, are you not? A. Yes, sir.

Q. When did you start fishing as a fisherman?

A. 1936, about March.

Q. And where was that? A. San Pedro.

Q. Did you continue to fish at San Pedro until the present time?

A. I continued fishing at San Pedro until the port was partially closed in the war in 1942, and then I moved to Newport Beach.

Q. And have you remained in Newport Beach since then? A. I have.

Q. You are there working as a commercial fisherman now, is that correct? A. Yes, sir.

Q. When you started commercial fishing in 1936 did you [3232] obtain a boat?

A. I built one up, yes, sir.

Q. You built a boat from scratch, or did you buy an old boat and built it?

(Testimony of Arthur D. Hill.)

A. I got an old hull that had been discarded, and then I put an automobile motor in it and built up my own boat.

Q. The total cost to you was about \$500, is that correct?

A. Approximately, yes; mostly for the motor.

Q. Did you sell that boat in 1942?

A. I did.

Q. By the way, you sold it for \$450, is that right? A. That's right.

Q. This boat you bought in 1936 and sold in 1942, was that a one-man boat?

A. Yes, it was a one-man boat.

Q. What kind of fish did you go after?

A. I fished a little mackerel with that boat, and I also trolled barracuda and albacore.

* * *

Q. (By Mr. Margolis): Did you fish continuously during [3233] 1936 to 1942? A. No.

Q. During what periods didn't you fish?

A. I didn't fish in the wintertime. My boat wasn't seaworthy enough to fish in wintertime and it wouldn't haul enough of a load of mackerel.

* * *

Q. (By Mr. Margolis): The rest of the year during that period did you fish continuously?

A. No, I didn't fish continuously the year around until I got my other boat in 1942. Then I was able to fish the year around.

(Testimony of Arthur D. Hill.)

Q. Aside from the period of approximately three months, or wintertime, when you didn't fish, did you fish continuously the rest of the year?

A. Yes, I fished in that part, yes.

Q. Did you buy another boat in 1942?

A. I did.

Q. Also a one-man boat? A. That's right.

Q. A 30-foot boat? A. A 30-foot boat.

Q. What did you pay for that boat?

A. \$1,000. [3234]

Q. Do you still own that boat?

A. I do.

Q. What kind of fishing have you done since 1942?

A. Mackerel and albacore and barracuda.

Q. Where have you sold that fish?

A. Well, the fresh fish I sold to Bayside up until about two years ago, then I sold from then on to the Western Cannery on the fresh fish. On the cannery fish I sold most of that to Western Cannery, and then I also sold French Sardine in San Diego, and then to Van Camp.

Q. Which of the fish that you have mentioned is fresh fish and which of it is cannery fish?

A. Barracuda is fresh fish, and then there was some sold I believe in 1943 that was canned, just a very short period there, and then the albacore that I sold to Bayside, he sold the bulk of the fish to the canner, and then he retained what he wanted for the fresh fish market. Then the mackerel, of course, was all cannery fish, as far as I knew.

(Testimony of Arthur D. Hill.)

Q. All right. Since you have owned this boat, have you spent all of your time that you spend fishing on this boat, or have you also worked on other boats?

A. I work on other boats, because my boat wasn't——

* * *

Q. (By Mr. Margolis): Did your boat have equipment for all kinds of fishing?

A. No.

Q. Were there periods when the only kind of fish that was available was fish for which your boat did not have equipment? A. That's right.

Q. What did you do during those periods?

A. I fished on other larger boats that had facilities.

Q. When you fished on those other boats did you fish on a share basis? A. I did.

The Court: What kind of fish could they catch that you couldn't catch?

The Witness: There are times, your Honor, that you can't catch albacore jigging, that is, they slow down on jigs but you can catch them better on bait, then I would go on a bait boat. Then, halibut, you can't catch halibut in this country on hook and line, so you have to have trammel-nets, so I would fish in trammel-net boats. And then shark fishing on hook and line has been very poor the last three or four [3236] years, so I fished on shark boats with shark nets.

The Court: Shark nets?

(Testimony of Arthur D. Hill.)

The Witness: That's right, gill nets, they swim into the net and get caught.

Q. (By Mr. Margolis): That is equipment you never had on your boat?

A. I haven't that equipment. My boat is too small.

* * *

Q. (By Mr. Margolis): Do you spend part of the time working on your own boat, maintaining it?

A. Yes.

Q. About how much time?

A. About two months.

Q. That is continuously, two months straight?

A. Not two months in an exact stretch. Like several weeks ago I was on the ways, I think three or four days in that period. Then sometimes I will spend as much as six weeks [3237] in making changes and painting and cleaning and overhauling the motors. I don't know, it is just an endless thing. I can't tell you all. But it takes approximately two months out of the season to maintain the boat.

Q. When you go fishing for market fish do you contact a dealer before you go fishing with regard to the disposal of your expected catch?

A. Yes.

Q. And will you tell us what your practice and custom is in that regard?

A. Well, I go to a dealer, generally of course after I get the catch, and deal with the dealer. I have one dealer I go to. We try generally to work with one dealer. I go down and ask him if he will

(Testimony of Arthur D. Hill.)

take fish tomorrow, that is, if I am just starting. If I am not starting, when I deliver my fish I generally ask him if he will take the next trip. [3238]

Q. Do you have any discussion of price?

A. No, the price is set when I come in.

* * *

Q. Tell us what you actually do, what your custom is.

A. I take the market price as paid for the fish when I come in.

Q. What do you mean by the market price?

A. Well, I was fishing last Thursday before I came to court Friday and the price was 13, so yesterday I went out fishing and I come in and the price was 10, so I took 10 for my barracuda cleaned yesterday.

Q. But you go to the dealer and he tells you what the price is, is that right?

A. That is right.

Mr. Rubin: That is objected to as calling for a conclusion, if your Honor please.

The Court: Overruled. It is asked and answered. It is in the record a hundred different ways and times; once more isn't going to hurt any.

Q. (By Mr. Margolis): You were in court when Mr. Naylor testified concerning an incident when he says that he paid you 29 cents a pound for barracuda and later on he found that the market was 12½ cents? A. I do.

Q. This occurred about four years ago?

A. That is right.

(Testimony of Arthur D. Hill.)

Q. Do you remember that incident?

A. I do.

Q. Will you tell us what happened at that time?

A. Well, I always used to rather pride myself in getting the first fish of the season, and I heard there was fish up in Santa Monica Bay, just a very few fish——

Q. You ordinarily go fishing in Santa Monica Bay, do you?

A. Not normally. At that time of the year sometimes I take ice and go up to Santa Monica Bay.

So I told George if he would pay me the Santa Monica price——

Q. You told who? A. George Naylor.

Q. All right.

A. ——that if he would pay me the Santa Monica price [3240] I would bring in the fish, which would be the first load of fish in Newport. There had been no fish up to then.

And I went up and I was up there almost a week. I only had 400 pounds when I got back, and so we had an argument about the price. He did not want to pay me the Santa Monica price, but finally he did, and the price he paid was 27, not 29, because I looked that up. And so he paid me 27 cents, but there was a big load of fish coming in from Mexico——

Q. Before you go on, he paid you the 27 cents and you received approximately a hundred dollars, is that right? A. That is right.

Q. Now what were your expenses for that trip?

* * *

(Testimony of Arthur D. Hill.)

Mr. Dixon: Objected to as immaterial.

The Court: Objection sustained.

Q. (By Mr. Margolis): Did you have extra expenses to that trip because of the fact you had to go to Santa Monica to get the fish? [3241]

A. I did.

Mr. Dixon: Same objection.

The Court: Same ruling. The jury are instructed to disregard the answer of the witness, which is stricken from the record.

Q. (By Mr. Margolis): What happened then with regard to barracuda coming in?

A. Well, there was a load of 30 ton came in from Mexico to San Diego on the following morning. I sold the fish that Saturday, and on the following Monday there was 30 ton coming in; and there also came in news that there was two boats out fishing that had about 20 tons of fish on board. So on the following Monday the price at San Diego went to 4 cents to the fishermen.

Q. So that the fish dropped from 28 cents to 4 cents in a period of a couple of days?

A. 27 cents.

Q. 27 cents to 4 cents?

A. Yes, on Monday.

The Court: Is this the barracuda season now?

The Witness: Yes.

The Court: The beginning of it?

The Witness: Yes, sir. It hasn't really got started yet, sir. [3242]

The Court: But it runs how long?

(Testimony of Arthur D. Hill.)

The Witness: It will run up until the end of August.

The Court: The barracuda season is longer than any other season, that is, of the fresh fish?

The Witness: No. sir. Really mackerel is the longest season.

The Court: But that is cannery fish?

The Witness: No, they fish mackerel for the fresh fish market too, sir.

The Court: The barracuda are not in these waters in the winter, is that right?

The Witness: That is right, your Honor. You see, they come in here to spawn, just like the salmon come up the river, and they come up here and spawn and when they are through spawning, in about September, that is, the fish will just drop off like that at the end of August. Then there is a few local fish that seem to go up around Santa Barbara and up through the channel there. I guess they go up the wrong way and they hang around all winter, but not enough to make good fishing.

* * *

Q. Mr. Naylor testified that he never paid less than the ceiling price, the ceiling price to the fishermen for fish when he bought from the fishermen during the period that [3243] OPA prices were in effect. Did you sell fish to Mr. Naylor during the period of OPA prices? A. I did.

Q. Did you always receive the ceiling price?

A. That I can't recall. I just can't recall it.

(Testimony of Arthur D. Hill.)

Q. Now Mr. Naylor also testified that he doesn't give direction to the fishermen to bring fish in to him, as to the species of fish for which they can go fishing and that he does not give such directions to the boats which he owns and controls. Have you ever worked on a boat which Mr. Naylor owned or controlled? A. I have.

Q. What was the name of that boat?

A. The Tropic Bird.

Q. How big a boat was that?

A. It was about, as I remember, a 38-foot, 40-foot boat.

Q. When did you fish on that boat?

A. I believe it was in 1944, if I remember.

Q. On a share basis? A. That is right.

Q. Will you tell us what the practice was with regard to the determination as to what species of fish you should go after?

A. Well, on that boat—of course we couldn't catch [3244] anything in any quantity except halibut because all we had was trammel nets, which is the customary gear for halibut.

Q. Who determined what gear was on the boat?

A. That was all the gear we had, was the trammel net.

Q. That was Mr. Naylor's gear, wasn't it?

A. That is right.

Q. That is all the gear he gave you?

A. That is right.

* * *

(Testimony of Arthur D. Hill.)

Q. During the time that you worked for Naylor on Naylor's boat, was the fish that was caught on that boat delivered anywhere except to Naylor?

A. No place except Naylor's; no. [3245]

* * *

Q. When you were fishing on the Tropic Bird, were you required to do anything else besides fish?

A. Yes.

Q. What else were you required to do?

A. We were required to maintain the boat and, that is, to keep it in condition, and also to maintain the nets.

* * *

Q. Let me ask you this question: Did you have to wait until after you had repaired the nets before you were paid? A. Yes.

Q. How long would that be sometimes?

Mr. Rubin: Objected to on the same ground.

The Court: Objection sustained. [3246]

* * *

Cross-Examination

By Mr. Dixon:

Q. Mr. Hill, how many times did you sail on the Tropic Bird?

A. I couldn't tell you the number of trips.

Q. Approximately how many times?

A. Well, I guess I was employed with the boat in repairing the nets and everything, about two months altogether.

Q. So during the entire period of time that you testified you have been a commercial fisherman

(Testimony of Arthur D. Hill.)

you were on the Tropic Bird during a period of approximately two months during that entire time, is that correct?

A. Well, I was on other boats besides that.

Q. I understand. I am talking now about the Tropic Bird.

A. Yes, that is the Tropic Bird.

Q. That is the boat you described as being one of Mr. Naylor's boats?

A. That is right.

Q. Who was the captain of that boat?

A. Andy Brocket.

Q. How many were in the crew of that boat besides yourself?

A. Andy Brocket and a fellow named Ed—I don't [3247] remember his last name—and myself.

Q. Now in addition to this fishing that you did on the Tropic Bird, I believed you testified that you owned your own boat, is that correct?

A. That is correct.

Q. And at other times you went out on other boats?

A. That is right.

Q. Other than your own, is that true?

A. That is right.

* * *

Q. It is a fact, is it not, Mr. Hill, that when you went fishing in your own boat you decided when you would go fishing, is that a fact?

A. Well, the weather and then whether I could sell the fish. Many things decided whether I could go fishing.

Q. That was a thing that you decided, was it not, Mr. Hill?

(Testimony of Arthur D. Hill.)

A. No. I couldn't decide that.

Q. Who decided for you then when you went out in your own boat, if anyone, to go fishing for fresh market fish?

A. Well, if the dealer would agree to take my fish, and then the weather, if that was all right, and then I thought I could catch fish, why then of course finally I would go.

Q. You were the only one, were you not, who decided whether you would or would not go fishing, Mr. Hill?

A. Well, I couldn't go fishing if I couldn't sell the fish.

Q. Well, you testified that you had some conversations with dealers before you went out fishing and that they would not give you any price for the fish that you might or might not catch.

A. That is right. [3249]

Q. That is a fact, is it not?

A. That is right; yes.

Q. So it is a fact that when you went out fishing you went out with knowledge of that fact?

A. That is right, yes, I went out with that knowledge.

Q. And it is a fact that there are other dealers at Newport Beach besides the Bayside Market, are there not?

A. That is right.

* * *

(The jury retired from the courtroom at 11:05 o'clock a.m.)

* * *

Mr. Margolis: I have some offers of proof in addition to that which I am ready with.

The Court: All right. [3252]

* * *

OFFERS OF PROOF

Mr. Margolis: If your Honor please, in this case, as in others, because of your Honor's previous rulings I did not ask what would ordinarily be the necessary foundation questions for an offer of proof, and I assume that as in other situations——

Mr. Rubin: We will make no objection for the purpose of this offer, Mr. Margolis, as to foundation.

Mr. Margolis: With respect to the witness Lloyd Munson, if your Honor please, we offer to prove if we were allowed to ask appropriate questions and he were allowed to answer those questions, that the witness would testify as follows: That the most money he has ever made in any one year since he started fishing was in 1946 when he netted a total of \$2700; that his average during that period, the period of his fishing, we don't have the exact figures, is well under \$2,000, probably closer to \$1500 than to \$2,000; that he lived in a home which he purchased for the total price of \$2500, and on which he pays \$20 a month; that he doesn't ice fish and hold it as a fisherman, because it is too expensive, it ties up his boat; that he doesn't have any money reserves so that he can hold fish and sell it at a time when the market is right, he has to dispose of it in order to get other money to continue living,

to go out and to fish again, and again sell that fish in order to live, therefore he cannot tie up his boat and cannot tie up his money by storing the fish; that he does not ice fish with the ice company because it requires a truck and a place to unload, and he doesn't have either, besides there is the question of obtaining room, which is a difficult one, the expense of storage, and finally that he has to turn around and end up by selling the fish to the same dealer to whom he would have sold it in the first place, and there is therefore no advantage to him in holding fish. The only advantage in holding fish is to the dealer who waits for the right kind of a retail market, or who makes the price on the retail market by withholding the fish from sale.

With regard to the witness Arthur Hill, we offer to prove as follows: That he does not own his own home; that he rents a place for \$17.50 a month; that the last time that he went fishing was on a share basis—that is, the last time prior to the time the trial began—was on a share basis and for a two weeks period made \$21.50. He took the place of a man who had given up fishing because of a heart ailment resulting from overwork. The last time he fished on his own boat——

I want to state these statements with regard to the last time he fished were statements about what occurred the last time prior to the trial, beginning of the trial.

The last time he fished on his own boat was in November that he was out about a week, got caught in a storm, lost his anchor, lost about \$30 on ice and

groceries, got no fish, and the damages to his boat ran about an additional \$30. He was out about three days without any sleep. The next to his last trip on his own boat he was out for a week and cleared about \$50 above expenses. In 1943 his net earnings were approximately \$2500. In 1944——

The Court: You are still talking about Hill?

Mr. Margolis: Yes. In 1944, \$750; in 1945, \$725; in 1946, \$1500. That he has at times checked the retail market when the price of fish——

The Court: This hasn't got anything to do with it, but why didn't these men go down in the war plants during the war years instead of being satisfied with \$50 or \$70 a month?

Mr. Margolis: A lot of them did that. Many of them did.

The Court: It is not material, counsel, at all.

Mr. Margolis: Mr. Hill tells me that they weren't allowed to go to the war plants. They were given certificates of availability. The government needed fish, felt that fish was necessary, and your Honor will remember a man couldn't go wherever he wanted to work; he had to have a certificate of availability, and a fisherman was not given a certificate of availability, except men who had very high skills in some other particular field where there was a greater demand for manpower, and those men did go. As to those men who didn't have specially high skills they were tied to their fishing boats.

That he has checked the retail price of fish, barracuda, and he has seen the price of barracuda, as

in the one instance, dropped from 28 cents to 4 cents, and in other instances from 16 cents to 2 cents in a single day; that he has checked retail prices during that period and found the retail prices running 50 cents and over without any drop in retail prices at all, at the time there was this tremendous drop to the fishermen. He doesn't ice fish and hold it, and his testimony with regard to the reasons would be the same as the testimony of Mr. Munson as to the reasons why he doesn't ice fish. In addition, he adds that fish deteriorate if iced in the boat and can only be held in the boat for a limited period. Some species cannot be iced in the boat at all.

We also offer to prove through this witness that he is thoroughly familiar with the customs and practices at Newport Beach; that he knows that on Naylor's boats all of the fish caught is delivered to Naylor and to nobody else.

By "Naylor's boats" I mean boats owned or operated by Naylor.

The Court: I understand.

Mr. Margolis: We offer to prove through the witness Burt D. Lackyard the following: He rents a home for \$20.00 a month. His wife works as a telephone operator. His earnings in 1944 were about \$400; in 1945, \$685; in 1946, \$662; and that in computing these earnings he has allowed nothing for depreciation on his boat. He has never, of course, been able to carry insurance. That none of the fishermen carry insurance on their boats because they can't afford it, none of the small boat fisher-

men. In 1944 and '43 his net income was about \$400 each year. In 1942 he did not start fishing until August and has no record of his earnings from fishing for that year, but it wouldn't be over \$100.

That completes our offer of proof.

* * *

Mr. Rubin: As to the offer just made by counsel, the government objects to each and every part thereof on the ground that it is immaterial.

The Court: Objection sustained. All right, Judge Kenny.

Mr. Kenny: At this time I would like to offer for identification Defendants' Exhibit next in order, civil action No. 1772-B, the complaint and the decree, both of which were filed and entered on September 5, 1941. The title of the case is United States v. San Pedro Fish Exchange.

In that connection I call your Honor's attention——

The Court: San Pedro Fish Exchange and others?

Mr. Kenny: Et al, yes, and other.

I call your attention to the discussion that took place at page 628 of the transcript. At that time—probably that is the easiest way of looking at that.

(Transcript passed to the court.)

Mr. Rubin: I understand this is being offered for identification, if I understand Judge Kenny correctly.

Mr. Kenny: Yes.

The Court: Only for identification?

Mr. Kenny: I suppose we would offer it in the presence of the jury, but we will have the discussion about it now.

The Court: It will be marked for identification, and you will offer it in evidence?

Mr. Kenny: That's right.

The Clerk: HH.

(The document referred to was marked Defendants' Exhibit HH, for identification.)

The Court: It will be in the nature of an offer of proof?

Mr. Kenny: That's right.

Mr. Rubin: The government at this time objects on the ground of incompetency, irrelevancy, and immateriality.

The Court: You were making some point in the testimony?

Mr. Kenny: Yes. Here is what we are up against, because the court remarked at the time we were discussing with Vitalich his association in the San Pedro Fish Exchange, we were examining him on his membership in the San Pedro Fish Exchange, that was a topic that had been brought out originally in the examination of Mr. Ross——

Mr. Rubin: On cross examination.

Mr. Kenny: Our problem is what the court said. The court said it was remote. The association was dissolved, according to the testimony, in 1939. Now that simply isn't so. We didn't know it at the time, and the court didn't know it, and the government didn't tell him.

The Court: That is what the testimony was.

Mr. Kenny: That is right, and the government sat moot, and it was only my research that was able to turn the matter up that they had brought an additional suit two years later, to-wit, in September, 1941.

The Court: The only ground of admissibility, as I see that, Judge Kenny, is impeachment of the witness who testified that it was dissolved in 1939. What witness was that?

Mr. Margolis: Mr. Ross.

Mr. Rubin: That was Mr. Ross, and they were referring to the F. T. C. matter, your Honor, and not an antitrust matter.

Mr. Kenny: That is correct. We were all left to believe that everything had been cleaned up by the F. T. C. matter in 1939. The government sat silent. It was only when I saw Senator O'Mahoney's report and have been able to see these cases that I discovered they had filed a case in 1941.

Mr. Rubin: I think the implication of Judge Kenny's remarks in the record is certainly uncalled for and forms no remarks in this argument or discussion.

Mr. Margolis: Didn't you sit silent?

Mr. Rubin: We sat silent a lot of times when you were examining. That doesn't mean we have to get up and educate the defendants on something that is immaterial and remote.

The Court: If they regard it as immaterial it isn't necessary to——

Mr. Kenny: They let your Honor say, without attempting to correct him, and tell the jury that the association was dissolved according to the testimony in 1939.

Mr. Rubin: As to the F. T. C. matter.

The Court: I subsequently held that the matter of the Fish Exchange, whether it existed or didn't exist, was completely immaterial.

Mr. Kenny: No, your Honor. You held it was remote.

The Court: Yes, remote and——

Mr. Kenny: It is two years less remote in 1941 than it is in 1939.

The Court: It is still remote.

Mr. Margolis: It goes to impeachment, your Honor.

The Court: If I can find the testimony of Mr. Ross in the record where he says—or whoever it was that did say it—that it was dissolved in 1939, then I can pass on whether or not it is admissible for impeachment purposes.

Mr. Rubin: I think page 236, would that help you?

Mr. Kenny: That's right, about 238. By the way, Mr. Ross also stated at page 480 of the record that he was going to send a copy of that F. T. C. order to the Department of Justice. We would like to have that now.

The Court: I think he came back later on the stand and said he couldn't find it; that he would look for it.

Mr. Kenny: Then he said he would mail it to the government. I wonder if the government has received it.

Mr. Dixon: Yes, your Honor, the government has it if it is material, and we are very glad to make it available.

The Court: I suppose they want it to make an offer of proof.

I think this complaint and decree might be admissible, because in the testimony of Mr. Ross, in his direct, he testified that when Mr. Zafran presented him the contract that he would not and could not sign it, that is, whether it was on that particular occasion or subsequent date, he would not and could not sign it because they had some, either restraint or something with the federal government.

On cross examination when that matter was gone into by Mr. Garrett an objection was made and I permitted it at that time and I see on page 235 my ruling:

“No, I think counsel opened it up on direct examination, and the witness has assigned it as one of the reasons why he could not or would not sign the contract. I think, therefore, it is material.”

Now, ordinarily why Ross would not or could not sign the contract would not be material or admissible except that the matter went into evidence on the direct examination of Ross. I don't know how that whole matter can be segregated and sifted out and strained from the record, because it is in there now, and it was put in subsequently by other witnesses

on direct examination from the government as to what they had said to Zafran or to somebody else as to why they could not sign the contract.

Mr. Rubin: If your Honor please, I don't recall that the government opened it up on direct with respect to Mr. Ross. If your Honor has the reference——

The Court: I see here, page 235:

“No, I think counsel opened it up on direct examination, and the witness has assigned it as one of the reasons why he could not or would not sign the contract.”

Mr. Rubin: As to Mr. Zafran?

The Court: When Zafran presented the contract to Ross, Ross told him he would not sign the contract either at that particular time or subsequently, because——

Mr. Rubin: Of the cease and desist order. It has nothing to do with this particular document, if your Honor please. All of the testimony until just the other day, all the testimony in the record had to do with the F. T. C. matter.

Mr. Kenny: That is right.

Mr. Rubin: It has nothing whatever to do with this civil action and this civil complaint.

The Court: Just a minute.

Mr. Rubin: Mr. Ross is a party to the F. T. C. matter; he is not a party to the civil action, not named.

The Court: Is Mr. Ross a party to that?

Mr. Margolis: All that appears is:

"The defendant San Pedro Fish Exchange is a voluntary unincorporated association, with its principal office in the Harbor District of the City of Los Angeles, California, at a place commonly known as San Pedro. The membership of San Pedro Fish Exchange is composed of numerous dealers and wholesalers having places of business at San Pedro."

It doesn't spell out who those are, but Mr. Ross has testified that he was a member of the San Pedro Fish Exchange.

The Court: Up until the time of the cease and desist order.

Mr. Margolis: He said after that there was no San Pedro Fish Exchange. He said it disappeared. He said there just wasn't any more.

Mr. Rubin: With respect to impeachment, your Honor, if they were to introduce evidence to show that Mr. Ross was in error with respect to the F. T. C. order, that might go to impeachment. There is no testimony in this record whatsoever from anybody as to the antitrust case filed in 1941, none whatsoever. And, furthermore, this is probably a technical objection, but I think it is good, this is a consent decree, and my understanding of the law is that there is no admission that is obtainable when defendants in an antitrust suit file a consent decree, and if I am not mistaken, by the statute of the Sherman Act itself. That is why people sign consent decrees. There is no implication derived therefrom for the purpose of treble damages.

The Court: This is not a treble damage action. The defendants keep saying they wish it were.

Mr. Rubin: I believe it states "in any subsequent proceeding," and this is certainly a proceeding, and we submit—

Mr. Margolis: As against the parties that deals with.

Mr. Rubin: It is used in this case as—it is endeavored to be used in this case as testimony against Ross, as impeachment. We submit, if your Honor please, there is nothing in the record concerning this particular complaint and consent decree. They are endeavoring to impeach a man who did not testify concerning the subject-matter.

Mr. Margolis: He said the San Pedro Fish Exchange went out of existence in 1939.

Mr. Rubin: This decree, we submit that the matters contained therein would have an effect upon this jury that goes far beyond anything—the purpose for which it is being offered. There are enough collateral matters in the case now.

The Court: The jury has to decide the effect and weight of it. If it were me and it were in the evidence, I don't think it makes any difference.

Mr. Rubin: I don't think so either, if your Honor please, but it will be in the record, and there are certain stipulations and findings which will be subject, undoubtedly, to argument by counsel to the jury which will go far beyond the purpose of testing the credibility of Mr. Ross. That is the real reason why we object to it.

The Court: I think that I will look through Mr. Ross' testimony. That is Volumes I and II, isn't it, Mr. Clerk, I, II and III?

We will recess until 2:00 o'clock.

* * *

The Court: I would expect that.

Mr. Rubin: The first mention, if your Honor please, of the cease and desist order appears, according to my research, on page 113 of the record.

The Court: 114 I have it marked.

Mr. Rubin: Well, the question starts at the bottom of 113, if your Honor please:

"Q. What did you tell Mr. Zafran when he handed you this document?

"A. That I could not sign that contract.

"Q. Did you say anything else to him?

"A. For the reason that at one time we were given, my company, the American Fisheries Company, was given a cease and desist order by the Federal Trade Commission in the matter of trying to fix prices.

"Q. How long ago was that?

"A. Between the years 1938 to about 1940."

That is the only matter on direct that the government touched upon in so far as Mr. Ross is concerned.

Mr. DiMassa, you will recall, did not receive the contract personally. It was received by Mr. Demeglio, his partner, and that reference is on page 990 of the transcript.

I might state there is no reference there at all to the cease and desist order.

The Court: Well, neither Mr. Ross nor Mr. De-meglio nor any of the parties who have been called as witnesses in this case are or were parties to the civil antitrust decccc 1772-B. Those parties are San Pedro Fish Exchange, Anthony B. Jaconi, Yoshitura Kamiya, M. N. Blumenthal, Hugh Reves, A. H. Finch, Elmo C. Jack, and J. J. Camillo.

In checking my witness list I don't find that any of them were called.

Mr. Kenny: Your Honor, I might support the foundation——

The Court: Were any of them called? Were any of these parties called as witnesses?

Mr. Margolis: No.

Mr. Kenny: I was just going to support the foundation by offering, for identification, as II, the cease and desist order of the Federal Trade Commission, Docket 3739, and call your Honor's attention to the fact that in that order is recited that the American Fisheries Corporation, Mr. Ross' corporation, is a member of the San Pedro Fish Exchange.

Mr. Rubin: Of course that isn't the document we are considering at this time. The government did not open the matter on direct, if your Honor please, to this particular proceeding.

Mr. Kenny: I also have two or three citations to the record. On page 281, two questions by Mr. Garrett. This is addressed to Mr. Ross.

“Q. When did the Fish Dealers Exchange go out of existence?

"A. Somewhere between the years 1938 and 1940.

"Q. And thereafter did the members continue to maintain uniform prices for the product they bought?"

And after objections the answer to that question comes on page 283: "The answer is no, sir."

Then at page——

The Court: Wait a minute. When this gets up on appeal they won't know whether Rubin is testifying, the court is testifying, Kenny is testifying, Margolis is testifying, or Garrett is testifying.

All right.

Mr. Kenny: Then on page 285, lines 21 and 22 and 23, Mr. Garrett says:

"Q. Who represented the Exchange?

"A. You mean prior to 1940?

"Q. While it was in existence.

"A. I believe it was Clifton Hix, Attorney."

Then on page—— I did have some reference on page 238. There is a reference to the F. T. C. order, but I don't think that is important.

I think the most important testimony bearing on our argument for the admissibility is the language at page 283, those two questions.

The Court: Let me examine the cease and desist order.

Is that all of your record references?

Mr. Kenny: No; I have two more in the examination of Mr. Vitalich, and that is at page 628 and

629. That, of course, is the part where your Honor by this time had also been misled and your Honor stated in the presence of the jury:

“The Association was dissolved, according to the testimony, in 1939.”

And that, of course, was substantially what Mr. Ross had led you to believe in his answers to Mr. Garrett's questions.

Then, if you will notice Mr. Andersen expressing skepticism said, “The organization was dissolved, may it please the court, according to the testimony.”

And you said, “That is the only thing I have to go on here.

And Anderson said, “According to the testimony. We don't believe it is dissolved.”

And then the last citation I will give your Honor is on page 629 at lines 17 to 20. There Mr. Anderson says:

“Q. As I understand it, the old association was dissolved before 1939 or 1940 when you were served with the cease and desist order, is that correct?”

And Vitalich says: “That's right.”

So we have got two of these government witnesses assuring the court that their organization was dissolved in 1939 or '40, and then we have the government's own action in 1941 bringing a civil action against the San Pedro Fish Exchange.

The Court: Let me examine the cease and desist order.

Mr. Kenny: Did I hand that up to your Honor?

The Court: Yes, thank you, I have it.

I have examined the cease and desist order. Now, you handed me up II; do you wish to make your record on that?

Mr. Kenny: I wish to offer that, I mean, have it marked for identification at this time.

The Court: With the intention of offering it?

Mr. Kenny: With the intention of offering that in evidence, too.

(The document referred to was marked Defendants' Exhibit II, for identification.)

The Court: The two documents HH and II present a little bit of a puzzle to me. It seems to me that they tend to corroborate the government's case. I don't know whether the defendants should offer them, and I don't know why the government should object, but the government does object. They have a right to object. I think under the law that they are both immaterial, except for one thing, and that is to establish the truth or falsity of the testimony of the witness Rose.

Mr. Kenny: And Vitalich, your Honor. Vitalich is the man who said at page 629——

The Court: Yes, that the association had been dissolved.

Mr. Rubin: Vitalich isn't a party to that consent decree.

The Court: He does not appear in the consent decree to have been alleged to be a member.

Mr. Margolis: But they said the association was dissolved.

Mr. Dixon: It may well have been, your Honor.

The Court: That association may have been dissolved. This may have been another one. There isn't anything in these two things that shows them to be the same association.

Mr. Margolis: I think just as there is the presumption, your Honor, that a person having a certain name is that person, so I think that here you have an association of wholesale dealers in San Pedro with exactly the same name. I think that maybe the government can come in and show it isn't the same association, and I would like to know whether the government represents that it is not the same association. I don't think the government should sit back here and say maybe it isn't the same association. The government knows whether it is or not.

Mr Rubin: As a matter of fact, I don't know, either Mr. Dixon or myself. We weren't in the division at the time of either of those proceedings.

The Court: In that connection, I think perhaps that the government should not—I think it would be quite inappropriate in connection with their oath to enforce the law to make an assertion at this time if they don't know. In other words, they have to hold themselves free to perhaps prosecute somebody else. If these are two different associations, they may want to hold themselves free to prosecute the members of the San Pedro Fish Exchange, which they should do, and not at this time make a concession or admission which might be taken as a concession on their part that somebody has not violated the law, when tomorrow they may discover that they have.

They may desire in pursuance of their duties to institute the same kind of prosecution against them that they have now and are in this case instituting against these defendants.

Mr. Margolis: We have two points, your Honor. One is the government's record will show it is certainly the same association. The second and more important——

The Court: The records may or may not. Those things are questions of fact.

Mr. Margolis: Here, your Honor, is the situation: There is an association with exactly the same name in exactly the same area composed of exactly the same type of people, same sort of dealers——

The Court: No, it doesn't appear to be, Mr. Margolis. I was under the impression that it was until I read this order to cease and desist. The consent decree seems to be aimed at a group of people who are or were superimposed upon the fish dealers as fish brokers. Jaconi and Yoshitura Kamiya, they are dealers and wholesalers; Blumenthal is a broker in Los Angeles; somebody is a seafood brokerage company at San Pedro; and the allegations go on that by virtue of their brokerage position in the market they are able to control and attempt to control the flow of—restrain the flow of interstate commerce in fishery products. And none of the witnesses who testified are designated.

The question which puzzles me a little more in connection with the matter—I am satisfied that neither of these matters are material, in connection with the allegations of the indictment here or the mat-

ters now on trial, and I feel that something should be done to correct the record in that respect, in so far as the cross examination of the witness Ross is concerned about the dissolution of this association. But on second thought, he testified and the record shows that he was a party to the consent decree, and there isn't anything here to show that he was a party to the other decree, nor the witness Vitalich.

Mr. Dixon: You mean he was part of the F.T.C. matter, the cease and desist order?

The Court: Yes, the cease and desist order.

My inclination is to let it all in, but my judgment is that it is not material. I will sustain the objection.

Mr. Margolis: If your Honor please, we are going to ask leave at this time—we have one very short witness to be recalled for a few minutes and then one last witness, and at the end of that we are going to ask for a continuance until tomorrow for the purpose of subpoenaing Mr. Ross and Mr. Vitalich to establish, according to what is our information, what we are informed, that the organization is the identical organization in the two cases. In other words, if your Honor's ruling is based upon the question—I am not quite sure whether it is, because——

The Court: I think the whole thing is immaterial, counsel. I think it is immaterial. Ross testified that he told Zafran that he wouldn't sign it because he was restrained by this cease and desist order, the general idea being that Ross conveyed

the impression that he couldn't sign it because it was against the law as far as he was concerned. I don't think that makes any difference.

Mr. Margolis: I don't want to re-argue the matter; I am just concerned with the record at this point. If we can have a stipulation that I can make an offer of proof in the absence of Mr. Ross, I am satisfied with making my offer of proof. Otherwise we did think that there wouldn't be any question about the identity of the two organizations, because our information is—although we don't have a witness who can testify to it—our information is that that is common knowledge that the two organizations are the same—there weren't two organizations, there was only one organization, and that it continued. We don't want our record to be in such shape that we haven't established that point, therefore we want to either subpoena Mr. Ross and Mr. Vitalich for the purpose of establishing that, or we want to be in a position, if your Honor thinks it is immaterial, to make an offer of proof in their absence as though we had called them and asked them concerning this matter.

The Court: I think it is immaterial. Whatever reason Ross had for refusing to sign the agreement I don't think is material in this case.

Mr. Margolis: As I say, I don't want to argue that point, your Honor.

The Court: I understand.

Mr. Margolis: I do want to make my record. If we can have a stipulation that we can make an offer of proof as though Mr. Ross had been recalled, why——

Mr. Rubin: I see no objection to that.

Mr. Dixon: We can't stipulate that this is the same organization.

Mr. Margolis: I am not asking for that stipulation.

Mr. Dixon: I am sorry.

Mr. Rubin: The stipulation is, as I understand it, if Mr. Ross were called, certain questions would be propounded to which we would object and you are now about to make your offer of proof as to what those would show over our objections.

Mr. Margolis: Yes, based upon what my understanding of the facts are.

I offer to prove that if Mr. Ross were recalled, your Honor, and appropriate questions were put to him and he would be allowed to answer them, he would testify that the San Pedro Fish Exchange which is mentioned in Defendant's Exhibit HH and the San Pedro Fish Exchange which is mentioned in Defendants' Exhibit II are one and the same organization; that his company and the other companies which were members of the San Pedro Fish Exchange in 1940 at the time that the order, Exhibit II, was entered were also members thereof during the periods mentioned in Defendants' Exhibit HH; that his testimony to the effect that the San Pedro Fish Exchange was dissolved about 1939 or 1940 was not true—

The Court: That the San Pedro Fish Exchange mentioned in Exhibit II?

Mr. Margolis: That's right, which as I have said is one and the same organization in my offer of proof. That his testimony to the effect that the San Pedro Fish Exchange was dissolved about 1939 or 1940 was untrue, and that the fact is that the San Pedro Fish Exchange was not dissolved until after September 15, 1941.

And I further offer to prove that if Mr. Vitalich were called and asked the same questions he would testify to the same effect.

Mr. Dixon: If the court please, if counsel will state in open court that the facts that he has offered in proof, that he knows of his own knowledge that this organization is the same organization, then we will agree.

The Court: And the same membership.

Mr. Dixon: Yes, and the same membership.

Mr. Margolis: I do not know of my own knowledge. This is the information I have. I have no other way of offering to prove this. I am not going to make a representation that I know this of my own knowledge. It is my belief that if Mr. Ross and Mr. Vitalich were called and were confronted with these documents that they would so testify. I make that representation upon information. I did not know anything about those organizations in 1939, '40 and '41.

Mr. Rubin: The government objects to the offer of proof on the ground of immateriality, if your Honor please.

The Court: I think it is immaterial and the objection will be sustained.

What I am concerned about, however, is the matter of the record that has been made, as to whether or not I should formulate an instruction to the jury in connection with evidence of the same nature, in order that the matter may be—as long as we are using the word “flow,” in order that the matter may flow to the jury fairly.

Mr. Rubin: I think the record will disclose, if your Honor please, that during the course of the trial you have so advised the jury, and that you also indicated that at the conclusion of the case you would reinstruct them in that respect. I think that has been mentioned once or twice.

The Court: In any event, the objection to the introduction of the two documents is sustained.

Mr. Margolis: On the ground it is immaterial and irrelevant?

The Court: On the ground solely that it is immaterial, and no other grounds.

* * *

TRANSCRIPT OF TESTIMONY

(Resumed)

The Court: Call the jury down.

(The jury returned to the court room and the following proceedings were had in the presence of the jury:)

* * *

GILBERT ZAFRAN

recalled as a witness on behalf of the defendants, having been previously sworn, was examined and testified further as follows:

Direct Examination
(Resumed)

By Mr. Margolis:

Q. Mr. Zafran, I show you Defendants' Exhibit Y, which is the Constitution and By-Laws of Local 36, and direct your attention particularly to a printed series of pages, about six or seven pages, headed "By-Laws," and the first item under that "Membership"; will you explain what the printed matter is which is attached to this mimeographed sheet?

Mr. Dixon: If the Court please, I believe it speaks for itself. It is entitled "By-Laws of the Association."

The Court: Let me see what counsel has handed you.

(The document was passed to the court.)

The Court: Yes, I think it speaks for itself.

Mr. Margolis: If your Honor please, the government handed us that copy with that attached, and I just simply let it go in. We want to show that those actually are not a part of the by-laws of Local 36, and we want to explain what happened in that regard.

Mr. Rubin: Mr. Kibre testified as to what that was. I don't want to argue in front of the jury, but the testimony is in.

(Testimony of Gilbert Zafran.)

Mr. Margolis: Here is what happened, your Honor: We [3254] had a copy of the by-laws—constitution and by-laws of Local 36 which did not have that attachment, which Mr. Kibre——

The Court: You mean a mimeographed copy?

Mr. Margolis: Well, the mimeographed copy was identical with this mimeographed copy, except it did not have attached to it this printed material. After Mr. Kibre had identified the document, the mimeographed document, I offered it in evidence, and government counsel said, "That isn't complete; here is a complete copy" and I took it and said, "All right, we will offer this one in evidence." I subsequently discovered I was wrong, and this was not a correct copy, it was not the one that we have and the witness Kibre identified, so we now have in evidence some thing which is not a correct copy of the by-laws and I simply want to show it.

The Court: Why don't you put Mr. Kibre on the stand?

Mr. Margolis: Because this witness is familiar with how this happened to get attached here, whereas Kibre was only familiar with the constitution as originally drawn. If I put Mr. Kibre on to ask him how this happened to get on he would say, "I don't know."

Mr. Rubin: He already testified as to how it got on. If I am in error I will stand corrected. In my opinion, if I recall correctly, he testified that Local 36 used the by-laws, printed by-laws which theretofore were used by Local 33, and they simply ripped them out of the constitution—— [3255]

(Testimony of Gilbert Zafran.)

Mr. Margolis: That is not the testimony.

The Court: Then let's find out what it is. Let me see the document.

(The document was handed to the court.)

The Court: Let me ask counsel the origin of this particular piece of paper.

Mr. Dixon: As I recall it, your Honor, that was produced pursuant to a subpoena duces tecum requiring the defendant association to produce a copy of their constitution and by-laws.

Mr. Margolis: That is correct, your Honor. I think that is true.

Mr. Dixon: And that is how the government came to have that document or exhibit in its possession.

The Court: This has pencil marks on it in here and arrows, and so forth. I suppose they ought to be erased before it goes to the jury.

The question is now what are these?

Mr. Margolis: That's right. As a matter of fact, your Honor will find that by looking at the mimeographed copy there is a section on membership, there is a section on membership on the printed copy that is different than the section on membership in the mimeographed copy. It is a document that obviously requires explanation.

Mr. Dixon: If the Court please, I believe we can refer [3256] to the record—I don't know just what the page number is at this time—which covers Mr. Kibre's testimony in which, as I recall his reply, he stated that the by-laws were taken from Local

(Testimony of Gilbert Zafran.)

33 and used by Local 36. And I think, as I recall it, I asked him about it at the time when the document was put in evidence.

Mr. Margolis: It is at page 2688. The witness said they did use the same by-laws that Local 33 uses. The by-laws are taken out of the published booklet of the Local 33 constitution. Then the witness never even looked at it, your Honor. It was handed to me and I offered it in evidence.

The Court: I don't know whether he looked at it or not. If he testified without looking at it, he is the witness.

Mr. Margolis: We are offering now, your Honor—

The Court: What page is that?

The Clerk: 2688.

(Transcript handed to court.)

Mr. Margolis: Your Honor, it all happened very quickly and I wasn't familiar with the document and I made a mistake.

Mr. Dixon: I think, your Honor, that I may be wrong, but it is my recollection that Mr. Margolis did read from the by-laws in reading from that document.

The Court: No, they were handed to him subsequently.

Very well. Upon your representation that you were unfamiliar with that document at the time it was handed to you, the objection is overruled.

Mr. Margolis: The record shows that that is so.

(Testimony of Gilbert Zafran.)

The Court: The witness may answer the question, and the question is, what do those by-laws represent.

Q. (By Mr. Margolis): By "those by-laws" I am referring to the printed documents.

A. You want to know what these by-laws represent?

Q. The printed by-laws attached to Exhibit Y and part of Exhibit Y at the present time.

A. Well, the printed by-laws that are attached to Exhibit Y, as I understand it, represent the admission of membership into Local 33. However, the constitution——

The Court: I think the explanation is getting involved.

Where did they come from?

The Witness: I don't know, your Honor. As far as we are concerned, the by-laws of Local 33 certainly shouldn't be [3258] attached to the situation as it is here.

Q. (By Mr. Margolis): Do you attach part of the by-laws and constitution of Local 33 to your by-laws as a matter of practice?

A. No. The only thing that we attach that had anything to do with Local 33 at all was the parliamentary procedure, which is generally the same. That is attached thereto. But there is an additional three or four pages that shouldn't be there. The part that we had attached is this parliamentary procedure part, which is usually the same deal. That was attached.

(Testimony of Gilbert Zafran.)

The Court: What do you mean by "this parliamentary procedure"?

Mr. Margolis: If your Honor please, the last three pages of this printed document are entitled "Selected Points on Parliamentary Procedure."

Q. Is that the part you customarily attached to your own by-laws?

A. That is the part we had attached to our by-laws. Where this other part came from, I don't know.

Q. And you do use the Selected Points on Parliamentary Procedure in Local 33, is that right?

A. Yes, that is right. That is the part that should be attached.

Q. Aside from that, do you use the by-laws of Local 33 [3259] at all?

A. No.

The Court: When a man becomes a member, do you give him a copy of that whole document there?

The Witness: We give him a copy of the constitution if he desires it.

The Court: You give it to him whether he asks for it or not?

The Witness: We don't. When he is sworn in we don't hand him a copy of the constitution, but he can have it at any time he desires it, or he can certainly find out what is in the constitution any time he asks. However, Local 33 did not have a booklet printed, the constitution printed in booklet form. We are a little short of money, and it takes a lot of money to have it printed, so we had it mimeographed and if a person asks for it we give it to him.

(Testimony of Gilbert Zafran.)

The Court: You do not hand it to him with the cards?

The Witness: No, sir. We don't hand it to him. As far as the obligation of membership into Local 36 is concerned, that is taken care of in the constitution itself.

The Court: That is, in the mimeographed portion?

The Witness: Yes.

The Court: Very well.

Mr. Margolis: We have no objection to these by-laws as to which the witness has identified as the by-laws of Local [3260] 33 remaining attached, but we are not offering them as the by-laws of Local 33.

The Court: They are all in evidence now, and the jury has heard the testimony, so when they come to a consideration of that particular portion they can give consideration to it that they believe it should have.

* * *

Cross-Examination

By Mr. Dixon:

Q. Mr. Zafran, you produced this document, did you not, marked Exhibit Y, pursuant to the subpoena served upon Local 36 to produce a copy of the constitution and by-laws?

A. I don't know that I did produce one. I don't believe I had one at the time.

Q. Do you know who produced this document?

* * *

The Witness: No.

(Testimony of Gilbert Zafran.)

Q. (By Mr. Dixon): Do you know whether it was produced pursuant to the subpoena served upon Local 36 to produce the charter and by-laws or comies thereof if the originals are not available of Local 36 or the International Fishermen & Allied Workers of America?

A. I don't know when they were produced, but I believe that there had been some question as to whether or not they should be produced, but when they were produced or who produced them, I don't know.

Q. So that you have no knowledge of how this——

A. No, I do not.

Q. ——portion of Exhibit Y——

The Court: He just answered that. You asked him that twice.

* * *

HARRY A. McKITTRICK

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Margolis:

Q. Mr. McKittrick, you are a defendant in this case?

A. Yes, sir.

Q. Are you a member of Local 36?

A. Yes, sir.

Q. How long have you been a member?

A. Since April 22, 1943. [3263]

(Testimony of Harry A. McKittrick.)

Q. Was that when the local was established?

A. About a month before that they actually started.

Q. Are you an officer of that Local or an employee of that local? A. I am an employee.

Q. Working in what capacity?

A. As business agent.

Q. Located where?

A. At present at Santa Monica.

Q. How long have you held that position?

A. Since February, 1945.

Q. Were you an employee of the local prior to that time? A. Yes, sir.

Q. In what capacity and where?

A. As business agent at Newport.

Q. For how long? A. April 22, 1943.

Q. Is that when you became an employee of the local?

A. I was hired by the executive board at that time.

Q. Prior to that time had you been a commercial fisherman? A. Yes, sir.

Q. When did you start fishing as a commercial fisherman. A. 1936.

Q. And did you fish continuously from 1936 to 1943? A. Yes, sir.

Q. During the period that you were a commercial fisherman have you ever owned a boat?

A. No, sir.

Q. During the period that you were a commercial fisherman did you ever own any interest in a boat? A. No, sir.

(Testimony of Harry A. McKittrick.)

Q. During the period that you were a commercial fisherman did you at all times work on boats on a share basis?

A. (Pause): Yes, sir.

Q. Is there any question about that in your mind?

Mr. Rubin: The question has been asked and answered, if your Honor please.

The Court: The witness hesitated.

* * *

The Witness: I hesitated a minute ago due to the fact that I was in charge of a live bait receiving barge for two years that was operated by Fellows & Stewart. I wasn't actually fishing during that period, and I hesitated to recollect how I was paid, but I was paid a share the same as a boat or a fisherman on a boat. [3265]

Q. (By Mr. Margolis): Was that a bait barge?

A. A live bait barge.

Q. You were in charge of that barge?

A. Yes, sir.

Q. You weren't actually going fishing at that time but there were others who were fishing on that barge?

A. Yes, sir.

Q. Do you know approxiamtely what percentage of the fishermen in the union in Newport Beach owned their own boats?

Mr. Rubin: That may be answered yes or no, may it please the Court.

The Witness: Yes.

(Testimony of Harry A. McKittrick.)

Q. (By Mr. Margolis): What percentage?

* * *

The Witness: I actually made a record at Newport in 1945 of all the boats fishing there and to the best of my recollection I believe there was 65 per cent of the fishermen [3266] that were workers or crew men and 35 per cent were boat owners.

Q. (By Mr. Margolis): The boat owners were also workers and crew members? A. Yes, sir.

* * *

Mr. Dixon: Pardon me. May I inquire, is that the union, Mr. McKittrick?

* * *

Q. (By Mr. Margolis): The question Mr. Dixon asked you was whether that was a survey of union boats or of all boats. A. Of all boats.

The Court: It is immaterial. The jury is instructed to disregard it. The only defendants here are the union and the named defendants.

Q. (By Mr. Margolis): Do you know what the situation was with regard to the union?

* * *

The Witness: No. [3267]

Q. (By Mr. Margolis): What percentage of the fishermen in Newport Beach belong to the union and what percentage did not at that time?

A. 95 per cent belonged to the union, 5 per cent didn't belong of the commercial fishermen.

Mr. Margolis: I submit, your Honor, in view of that statement that the figures are not far off under your Honor's instruction.

(Testimony of Harry A. McKittrick.)

The Court: Do you move to re-admit it?

Mr. Margolis: I move to re-admit it.

The Court: Motion granted.

* * *

Q. Are you familiar with the efforts since 1936 of fresh market fishermen to procure contracts with the dealers?

* * *

A. Yes.

* * *

Your first knowledge of the industry in connection with it was in 1936, is that right?

A. That's right.

Q. Starting in with that time, when is the first instance that you know of when fishermen made an attempt to procure contracts covering fresh market fish in the Southern California area?

Mr. Rubin: Just a moment. That is objected to, if your Honor please, as being immaterial and remote.

The Court: Let me hear it again.

(The question was read by the reporter.)

The Court: You mean the price of fresh market fish?

Mr. Margolis: Contracts generally. I will get to what kind of contract. This is a preliminary foundation question.

The Court: As a preliminary question it is admissible. The objection is overruled.

The Witness: May I answer?

(Testimony of Harry A. McKittrick.)

The Court: Yes, you may answer. And that is the date [3269] A. 1937.

Q. (By Mr. Margolis): Where was the contract presented? Which one of the ports, I mean by that.

Mr. Rubin: We object on the ground it is completely remote to the issues of this case, and immaterial.

The Court: I can't see the materiality of it, counsel. The objection is sustained.

Mr. Margolis: I don't want to——

The Court: Objection sustained, counsel.

Mr. Margolis: Your Honor, I was going to talk about something else. I intended to carry this matter——

The Court: Do you mean talk about a recess?

Mr. Margolis: That is all right, your Honor.

The Court: Go ahead.

Mr. Margolis: I intend to carry it on right up to date. I didn't know from your Honor's ruling if it was on the basis of remoteness.

The Court: I think it is remote.

Mr. Margolis: The reason I started there was that the previous evidence had been admitted going back to 1934, and I assumed if that wasn't too remote that the 1936 testimony wasn't either. However——

The Court: The objection is sustained. It is remote. Let's get on.

Q. (By Mr. Margolis): When was the next time that you [3270] know—I am trying to get

(Testimony of Harry A. McKittrick.)

some guidance, but if I have to ask him this way, I will. When is the next time that you know of when a contract—withdraw that.

When was the next time that the fresh market fishermen made an attempt to secure contracts in the Southern California area, to your knowledge?

A. You said fresh market?

Q. Yes.

A. May I ask if the previous question that I answered was also that pertaining to fresh market?

Q. Yes.

A. Well, I was wrong. I thought you said “contract.”

Q. I did say “contract,” but with regard to fresh market fish.

A. It wasn't with the fresh market. It was at Newport with the canneries.

Q. Now, will you answer, then, my question with regard to fresh market fish? When is the first time that you ever attempted to obtain a contract?

A. 1943 or 1944 with fresh market dealers.

Q. And where was that attempt made?

A. Santa Monica and San Pedro.

Q. Do you know of a previous attempt being made in Newport Beach?

* * *

A. No.

* * *

Q. (By Mr. Margolis): Those are the contracts concerning which there has been testimony, Mr. McKittrick, concerning which Mr. Kibre and Mr. Zafran testified, is that right?

A. Yes, sir.

(Testimony of Harry A. McKittrick.)

Q. As an official of the union would you tell us something about your duties and your functions? What, generally, have been your duties and functions as an officer of the union?

A. I am afraid it will be objected to.

Q. Well, that shouldn't bother you.

A. Well, here goes. If I make a speech, stop me.

Mr. Rubin: Before you start, may we confine this—I am not objecting at this time, but may we confine this to what he did, not what his duties were supposed to be? We might not have too many objections if he testified as to what he did.

Q. (By Mr. Margolis): I will confine it for the present as to what you did as an employee of the union, what you had done.

A. I had hardly taken office after being hired before I was called on to take up subjects with the OPA, with the [3272] Army and Navy, Coast Guard, Western Sea Defense Conference, in reference to restrictions that were placed on the fishing industry by these various organizations and rulings of the OPA, and troubles with the dealers in violating the understanding that we had on prices that they would pay us. With the OPA we held several conferences in Los Angeles on barracuda and albacore, which we felt we had been treated unjustly on.

* * *

A. (Continuing) The dealers participated and all other government agencies, because we were in a war at that time, and our organization had been mainly formulated to——

(Testimony of Harry A. McKittrick.)

Mr. Rubin: Just a moment, if your Honor please. we were going to confine this to what Mr. McKittrick did.

* * *

The Court: By the way, you say you were hired as business agent?

The Witness: Yes.

The Court: Who hired you?

The Witness: Executive Board of Local 36 at Newport Beach.

The Court: Who is that? Executive Board is just a [3273] name. Were there people there?

The Witness: They were elected, fishermen.

The Court: Who were they?

The Witness: By name?

The Court: Yes.

Mr. Margolis: How many were there, first of all?

The Witness: Fifteen.

The Court: Well, do you know any of them?

The Witness: All of them. Johnny Norek, Malcolm Stewart, Charlie Wallace, Earl Bowers, Mel Butts, Keith Rima, Jess Furrow. Do you wish any more?

The Court: I don't know. I am just asking you who they were.

The Witness: They were actual fishermen who had been elected by the membership to act as executive board and management committee for the union.

(Testimony of Harry A. McKittrick.)

The Court: I see. Who was your immediate superior? Who did you take orders from?

The Witness: The executive board, those members.

The Court: You had to convene them every time?

The Witness: They meet once a week or on call. They had a regular procedure which is stated in the by-laws and constitution as to when they meet.

The Court: Did you have any dealings with Mr. Zafran?

The Witness: Mr. Zafran was working for the California [3274] Curing & Packing Company at that time. He wasn't with us.

The Court: In the union organization, when you want to get some orders who do you go to? Do you go to the secretary or somebody like that, or do you have to call the whole board together when you want to know what to do?

The Witness: I am actually the only officer, outside of this girl, in the office, but I can take no actual positive action, steps to do anything on my own initiative without the authority of that executive board.

The Court: That is for Local 36?

The Witness: Yes.

The Court: You are the business agent?

The Witness: At that time, 1943 to 1945.

The Court: I see. Now we get back to the business of what you were doing.

(Testimony of Harry A. McKittrick.)

Q. (By Mr. Margolis): You are still a business agent, aren't you? A. Yes.

Q. But your activities are limited to one port, is that [3275] right? A. Two ports.

Q. What are those two?

A. Originally Newport, I had authorization to assist the fishermen at Santa Monica and put in a sub-unit there, which I did in 1944; then in '45 I transferred from Newport to Santa Monica and got authorization to endeavor to organize the fishermen at Redondo and Santa Barbara.

Q. Do you still take orders from the executive board? A. Yes.

Q. Go on with what you do.

A. I found at Newport that the dealers complained that they couldn't buy any fish due to the fact that they didn't have any boxes to put those fish in and they had no place to store them, there wasn't a dealer in Newport that had even an ice box, so we had to do something about it, and I come into Los Angeles to the priority boards and met Mr. Squires, the chief of that department, Mr. George Roberts, the labor relations representative, and they put me in contact with the lumber association at San Francisco in an endeavor to get shucks so that we could built boxes. The priority boards granted us a priority to get that. Shortly later we got sufficient material to get the boxes, and they subsequently were built. That permitted us to deliver more fish, but at one time we had our boats come in loaded with fish, and the [3276] dealers couldn't buy them

(Testimony of Harry A. McKittrick.)

or wouldn't, and the fish lay on the boats and had to be re-iced, or they would have spoiled. And that period lasted for about a week's time. During that time the boats were unable to go fishing because they had a load waiting to be able to sell it, and the excuse was that the market was glutted and they couldn't get boxes and they couldn't get storage space. So I wrote a letter to the Pacific Ice Association at Frisco and got a list of the ice companies in the vicinity of Newport and Los Angeles who were in a position to take cold storage—had cold storage and would be able to take fish. On inquiry I found it was impossible to get any space allocated as the various dealers at San Pedro and in Los Angeles had most of the space contracted for on a yearly basis. One of the witnesses here, the Union Ice Company——

Q. Don't tell us about the witnesses. Go ahead.

A. I approached the Union Ice Company in Wilmington. They told me——

The Court: When was this?

The Witness: In 1944 and '45. And they told me they had 300 or a ton of space or over but it was all under contract to Los Angeles and San Pedro dealers and they couldn't take on any more independent or outside parties for the storage of any fish, so we had to do something about that, and I contacted one of the most responsible dealers in L. A., and through his [3277] help and our secretary Mr. Kibre we arranged with the ice company at Newport that they would build their own storage

(Testimony of Harry A. McKittrick.)

and put in a sharp freeze plant. Mr. Reed, the owner, finally did so, but it took over a year's time to accomplish that, and we virtually lost that extra fish which we could have delivered had we been able to accomplish that speedily enough.

Q. (By Mr. Margolis): During this period were any arrangements made for the delivery directly to Los Angeles of fish which the Newport dealers would not buy? A. Yes.

Q. Tell us what you did in that regard?

A. The boys came in one day and were told that they couldn't deliver any fish the next day, so they came over to the office and told me about it, and I investigated and found that the dealers said that the market was flooded, that they couldn't handle any more, so they were going to have to lay the boys off for a few days. I contacted the Paladini Company in L. A., and Mr. Puccinelli, their manager, gave me orders to go ahead and buy all the fish that I could and he would send his trucks down and take it all to Los Angeles, which I did. And that continued for approximately five or six days, when the dealers in Newport decided that they then could take fish again and told our boys to go ahead. At another time they had posted notices that they would take no fish. We called an indignation meeting of the fishermen, [3278] held it out in the open air, and had about three hundred fishermen present. They appointed a committee, of who I was one, and I suggested we go and see the canneries. We went to the Golden State Cannery in

(Testimony of Harry A. McKittrick.)

Long Beach and he agreed to take all the barracuda that we could catch, providing we would deliver it at the cannery in Newport, which was associated with him. He made us a price of 7 cents a pound, when we were asking for 10 from the wholesale fresh dealers, but he told us, "Remember, you can deliver to us seven days a week, whereas you can only deliver four days to the fresh dealers. They don't want much fresh fish on Friday, they don't take any fish on Saturdays or Sundays, and if you got 7 cents for round fish, that is actually a better price than 10 cents for cleaned fish," which was what the Newport dealers had been paying. Saturday they told us, the boys there, they could go fishing. Some of them asked. "How much are you going to pay?"

"Oh, a nickel or six cents."

"Well, I will be in tomorrow."

The Court: When was this?

The Witness: That was in 1944.

The Court: Still 1944?

The Witness: Yes, sir.

The Court: All right.

The Witness: When they came in they all passed up the fresh fish dealers and went to the end of the slip where the cannery was located, and we unloaded approximately 35 tons of fish.

That was transported to Long Beach and subsequently processed and put in cans.

(Testimony of Harry A. McKittrick.)

When the boys came by the dealers' places of business they were told, or asked, "What did you do with your fish?"

Mr. Rubin: Now just a moment. If your Honor please, we are going to object to any further testimony. I think we have gone far enough.

The Court: Yes. I think it is a little discursive.

* * *

Cross-Examination

By Mr. Dixon:

Q. Mr. McKittrick, I believe you testified on direct examination to some conversation with an ice company at Newport to build an ice plant for the storage of fish at Newport? A. I did.

Q. With what company were those conversations had? A. Newport Ice Company.

Q. Did they ever build a plant there at Newport?

A. They did.

Q. Now it is a fact, it is not, that Local 36 does not own, lease or operate any ice plant or storage plant for fish? A. That is correct.

* * *

Mr. Margolis: If your Honor please, at this time, subject to the one request that we have just made, the defendants [3282] rest.

The Court: Rebuttal?

Mr. Rubin: Mr. Whitmarsh.

ROBERT L. WHITMARSH

called as a witness by and in behalf of the government in rebuttal, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Rubin:

Q. Mr. Whitmarsh, what is your business or occupation?

A. I am a Special Agent of the Federal Bureau of Investigation.

Q. And you are a trained accountant, are you?

A. That is right.

Q. With reference to Government's Exhibits Nos. 42, 43, 44, 45, 46—— [3283]

Q. With reference to Government's Exhibit's 42, 43, 43A, 45, 46 and 42-B, 43-A, 43-B, 44-A, 44-B, and 45-A, have you made an examination of those exhibits for the purpose of abstracting certain information contained thereon?

A. I have.

The Court: Just a moment. Let's identify them more than by the number. Has the Clerk them?

Mr. Rubin: They are these large boxes and ledgers, if your Honor please. I think they would be more readily available by describing them from the Clerk's minutes. They are the boxes and the ledgers.

The Court: Will you move them around, Mr. Bailiff, and pile them on the Clerk's desk so that we can see what you are talking about?

(Testimony of Robert L. Whitmarsh.)

Now 43, 43, 44, 45 and 46 are the boxes?

Mr. Rubin: That is correct, your Honor please.

The Court: Of cards?

Mr. Rubin: That is right.

The Court: And the others are the ledgers, the books which have been identified as membership cards and ledgers of Local 36, is that correct?

Mr. Rubin: That is correct. No. 46, I believe, however, is the ledger account of Redondo Beach. I think that is the only one that doesn't carry an alphabetical initial.

Q. Now what is the general nature of the exhibits [3284] that you have just referred to as being those from which you abstracted this information?

A. They are the application cards filled out by applicants applying for membership in this local.

Q. And those exhibits that bear an initial following them, what generally are those exhibits?

A. Those are the current membership books of the local.

Q. Now will you state to the Court and jury the nature of the first examination that you made of the information contained only in the application cards?

A. I made an examination of the application cards and I was interested in this first examination in the information contained in these cards concerning the employment of the individual who made out the card. That is, whether or not he stated on this application card whether he was self-employed,

(Testimony of Robert L. Whitmarsh.)

whether he owned his own boat, or whether he was employed by someone else, or whether or not he made any statement whatsoever in that regard.

Q. And calling your attention to Government's Exhibit No. 58 for identification, I will ask you to state what was the gross total of the application cards which you examined.

A. I examined 1561 cards.

Q. And is that the total of the cards which are now in evidence?

A. That is correct. [3285]

Q. Now did all of those cards have information from your examination appearing thereon as to whether or not they were initiated members of Local 36?

A. Not all of them.

Q. Did you thereafter examine the cards for the purpose of selecting those which on their face appeared to be such initiated members?

A. I did.

* * *

The Court: Do you have several summaries there?

* * *

The Court: What are they?

The Clerk: 58, 59, 60 and 61.

(Documents referred to were marked Government's Exhibits Nos 58, 59, 60 and 61 respectively for identification.) [3286]

Q. Calling your attention to Government's Exhibit 59, what is that a summary of?

(Testimony of Robert L. Whitmarsh.)

A. Going through these cards I found that of the 1561, only 1121 applicants made definite statements as to whether they were self-employed, owned their own boat or were employed by another person.

Q. Now that is as to the total number of cards, whether they appeared to be initiated or not?

A. That is correct.

Q. Now calling your attention to Government's Exhibit No. 60, will you state generally what information is contained in that summary?

A. After analyzing and going through the total number of cards, 1561, I then tried to determine how many of these cards on the face of the card indicated that the individual had been initiated into the local.

Q. Now with respect—just one moment—with respect to that determination, what factors did you take into consideration?

A. With respect to that determination I noted those cards contained information on the face of them that the person was initiated. If it said initiated and the date and the initiation amount was indicated on the card, I then assumed that that person had been initiated into the local. [3287]

If no such information appeared on the face of the card I then checked the local membership list of the local to determine whether or not that member was a member of the local.

From this I found out that 1306 of the original 1561 applicants were initiated into the local. [3288]

(Testimony of Robert L. Whitmarsh.)

Q. Now, with respect to those that you determined were actually initiated into the Local, would you state to the court and jury the nature of the information that you abstracted from those cards and summarized in Government's Exhibit 60?

A. From this 1306 cards I took information from those cards containing statements as to their employment of these particular applicants. I noted that 460 of this 1306 stated that they were self-employed.

Q. What percentage is that of the total 1306?

A. 35-2/10 per cent. I then noted that 80 of these 1306 applicants stated that they either owned their own boat or were a co-owner of the boat. And this 80 is 6-1/10 per cent of the 1306 figure. The total number of applicants stating that they either owned their own boat or were self-employed was 540 out of the 1306, or a percentage of 41-3/10 per cent. I then noted that the total number of individuals applying for membership out of this 1306, 439 stated that they were employed by others.

Q. Mr. Whitmarsh, in connection with that statement they were employed by others, what was the nature of the information that was contained on the application card?

A. On the back of the application card there appeared a question as to employment, "Employed by," and this number 439 indicated employment by some other person by putting in the other person's name. [3289]

(Testimony of Robert L. Whitmarsh.)

Q. Was another name inserted?

A. At that point, yes.

Q. All right.

A. This 439 who stated they were employed by others is a percentage of 33-6/10 per cent of the 1306. I noted also, of this 1306, 239 applicants stated that they were employed, but gave no indication as to whether they were employed by themselves or by someone else.

Q. What would be the nature of the information in the employment blank with respect to that item?

A. After the question "Employed" they would merely state "Yes," which would indicate they were employed, but they gave no indication as to whether they were employed by themselves or by some other person. This 239 who gave no indication as to employed by themselves or others is 18-3/10 per cent of the 1306. There was another group of applicants who gave no information at all concerning employment. 43 applicants fall into this group giving no information at all, which is a percentage of 3-3/10 per cent of the 1306. Another group of 29 stated they were not employed. This is 2-2/10 per cent of the 1306. 14 of these applicants made no statement as to whether they were employed by themselves or by some one else, but they gave a type of work which would indicate that they were employed by others.

Q. Such as what? [3290]

A. Such as a deck-hand or a cook or some type of employment there that would indicate employment by others not an owner of a boat or self-employed. This is 1-1/10 per cent of the 1306.

(Testimony of Robert L. Whitmarsh.)

I also noted that two of the applicants out of the 1306 stated that they were fishing on shares, which is 2/10 of one per cent of the total count of 1306.

Q. As I understand, Mr. Whitmarsh, Government's Exhibit No. 60 representing a total of application cards of 1306 include those who gave earlier no information of how they were employer, or what else?

A. This summary 60 is the complete information given by the 1306 as to their employment, whether they were self-employed, whether they owned their own boat, whether they were employed by others, or whether they merely stated they were employed and gave no indication as to whether it was by self or others, or gave no information at all concerning employment, whether they stated they were not employed or made no statement as to whether they were employed but gave a type of work which would indicate that they were employed by others, and also the two who stated they were fishing on shares.

Q. All right. Calling your attention to Government's Exhibit, for identification, No. 61, I will ask you how many cards were examined from which that summary was prepared. [3291]

A. This summary was prepared from the one——

Q. How many cards were examined?

A. 993.

Q. What did that total represent?

A. This represented, this 993 figure represents the number of the 1306 which I previously broke down——

(Testimony of Robert L. Whitmarsh.)

Q. Just a moment. That 1306 were those that indicated they were members?

A. That is correct. This 993 is the number of the 1306 making definite statements as to whether they were self-employed, owner or co-owner of a boat, or were employed by others, or made a statement as to their employment which would indicate that they were employed by others.

Q. So that the 1306 percentages and numbers include those that make no definite statement and the 993 are those which do actually make some statement on the membership cards?

A. That is correct.

Q. And it appears therefrom that they were duly initiated as members, is that correct?

A. That is correct.

Q. All right. What did that summary indicate?

A. Of the 993, 460 applicants stated that they were employed by self or self-employed. This is 46-3/10 per cent of the 993. 80 of these applicants stated that they either own their own boat or were the co-owner of a boat. This is [3292] 8-1/10 per cent, or a total of 540 applicants stating either that they own their own boat or were employed by themselves, were self-employed.

Q. What percentage is that?

A. This is 54-4/10 per cent of the 993 figure.

The Court: 993 is the total of all of the 1306 cards from which any information was available concerning their employment, as I understand your statement?

(Testimony of Robert L. Whitmarsh.)

The Witness: Yes, the cards on which the applicant made a definite statement——

The Court: On which there was any information from which you could deduct that they were employed or not employed, stated that they were employed or not employed?

The Witness: Yes.

The Court: The rest of them had nothing on it?

The Witness: Yes, some of them had no information at all.

The Court: All right.

Q. (By Mr. Rubin): What is the other information contained on 61?

A. I found that 439 out of the 993 stated on the application cards that they were employed by others.

Q. In that connection what information was contained on the cards to the effect that they were employed by others?

A. "Employed by" is one of the questions on the application [3293] card, and they would write the name of a person following this question. This 439 who stated they were employed by others is 44-2/10 per cent of the 993. 14 of the 993 applicants I found made no statement as to whether they were employed by themselves, but the type of work which they gave on this application card would indicate employment by some other person. This 14 is 1-4/10 per cent of the 993. The total of those making a definite statement they were employed by others and making no statement but giving a type of work which would indicate they were employed by others is 453 or 45-6/10 per cent of the 993 figure.

(Testimony of Robert L. Whitmarsh.)

Q. So those that you could determine were actually members and did make some definite statement, 54-4/10 per cent were self-employed or owners or co-owners, and 45 per cent indicated they were employed by, and then the name of a party?

A. 45-6/10 per cent stated they were either employed by others or gave the nature of their employment to indicate they were employed by someone else.

Q. By filling in the name of a person in the blank?

A. That is correct.

Mr. Rubin: At this time the government offers Exhibits numbered 58, 59, 60 and 61, heretofore marked for identification, into evidence.

The Court: Admitted. [3294]

(The documents referred to, heretofore marked for identification as Government's Exhibits 58, 59, 60 and 61, were received in evidence.)

* * *

Cross Examination

By Mr. Margolis:

Q. As of what date are these exhibits made out?

A. They show the situation of all the cards in those boxes.

Q. And to what date do those cards run?

A. Well, they are the current membership ledgers. I am given to understand these are the current membership ledgers, and all applications which have been made to the union.

(Testimony of Robert L. Whitmarsh.)

Q. If a man, say, joined the union in 1943 and it showed that at that time he was initiated, he was included in this exhibit whether or not he was a member of the union at the present time, is that right? A. That is correct.

Q. So this is really not a statement of all of the members of the union as of any given time, but of all persons who have been initiated into the union since 1943 or the date [3295] that those cards begin, is that right?

A. The ones that applied for member represented by those application cards.

Q. Do you know what is the earliest date they run back to? A. No, I don't.

Q. They run back at least to the early part of 1943; that is so, isn't it?

A. I am not sure what date they run back to. I didn't check the dates.

Q. For example, here is one of the cards which is included, a card for Paul J. Alexander, 4-21-43.

A. That is correct, then.

Q. He was included in that exhibit, is that right?

A. He was.

Q. Do you know whether he is a member of the union now? A. No, I don't.

Q. Do you know how long he continued to be a member of the union? A. No, I don't.

Q. The total number employed by self, those men who indicated they were employed by self did not indicate whether or not they owned the boat, if they indicated that they owned the boat then you put

(Testimony of Robert L. Whitmarsh.)

them under owner or co-owner of boat, isn't that correct? A. That is correct. [3296]

Q. So that as far as these exhibits show, it is a fact, is it not, that only 6.7 per cent of the total number of application cards, including those who were and who were not initiated, owned boats and only 6.1 per cent of those initiated own boats?

* * *

The Witness: I see the 6.7 figure.

Q. (By Mr. Margolis): Don't you see the 6.1 figure on Exhibit 60?

A. Oh, yes. I see it.

Q. That is correct, is it?

A. The 6.7 per cent of the total applicants stated that they owned their boats. 6.1 per cent of the 1306 applicants who were initiated into the union, into the organization, stated that they owned their own boat. That is correct.

Q. As to those who were employed by self, you don't know whether they had an interest in a boat or whether they [3297] operated a boat owned by a cannery or by a dealer, do you?

A. No, they merely stated, where it said employed, they would write "self." That is where I got this information.

Mr. Margolis: That is all.

Mr. Rubin: Just one other question.

Redirect Examination

By Mr. Rubin:

Q. Mr. Whitmarsh, in connection with the information as to the percentage, as to those who

(Testimony of Robert L. Whitmarsh.)

stated they were the owner or co-owner of the boat, did the cards request that information specifically?

A. No, it didn't.

Q. And the information as to whether they were owner or co-owner was written in at what blank?

A. It was written in usually, employed by, they would say, "owner of boat" or "co-owner of boat."

Q. So that some of the answers in the blank "employed by" said "self" and some said "owner" or "co-owner" of boat? A. That is correct.

Q. There was no specific questions as to whether they owned the boat or not? A. No.

Q. Could you tell from the cards as to those who indicated they were employed by self that they were owners or co-owners of boats? [3298]

A. There was no way I could tell; no.

* * *

The Court: Does everybody rest?

Mr. Margolis: We do have that one request, your Honor.

Mr. Rubin: We will say it then. The government has no further rebuttal.

Mr. Margolis: As I say, the letters, we will not offer anything that will require a foundation.

The Court: The presence of the jury?

Mr. Margolis: That will not require the presence of the jury; no. [3299]

* * *

(The jury retired from the courtroom at 4:15 o'clock p.m.)

The Court: The letters which you suggested can probably be as appropriately presented Thursday morning as tomorrow morning.

Mr. Margolis: I see no reason for tomorrow.

The Court: Then counsel need not make the effort to come up tomorrow except to send a messenger up with the instructions.

Mr. Margolis: What time Thursday?

The Court: What time is convenient? 9:30?

Mr. Margolis: Any time your Honor sets.

The Court: Probably 10:00 o'clock might be better. [3301] 10:00 o'clock Thursday morning for conference as to the instructions.

Now I am not sure what is meant by the new rules requiring the defendants to be present at all stages of the proceedings and whether or not a conference on the instructions is a stage of the proceedings. Heretofore in criminal matters I have insisted upon them being present. In this matter we have recognized the waiver of their presence.

Mr. Margolis: It would seem to me that it would serve no useful purpose having them here.

Mr. Kenny: Mr. Kibre has offered to be here as a token defendant.

Mr. Kibre: We would like to keep the boys out fishing if possible.

Mr. Margolis: We do have one more thing, your Honor, for the purpose of the record. We do not propose to argue this matter, but for the purpose of the record at this time we desire to make a motion to dismiss on behalf of all and each of the defendants on the ground of the insufficiency of the evidence.

The Court: I have been wondering about some of the defendants here. I suppose logically if there was enough to hold them at the conclusion of the government's case there is now.

Mr. Rubin: That is correct, if your Honor please. [3302]

The Court: Because the individual defendants, as they have taken the stand, none have been examined upon anything except Mr. Kibre and Mr. Zafran, as to the facts concerning the making of the contract, its submission and the accusations in the indictment. That is to say, all the other defendants have been examined on the basis of who they were and what they did.

Mr. Rubin: That is correct. The record is the same now as to the individual defendants as it was at the time of the conclusion of the government's case, if your Honor please, with respect to the evidence against the individual defendants.

The Court: What is the evidence as to the defendant Lackyard? All the rest of them here have been actively engaged. He says that he is a member of Local 36 but that he never caught fresh fish except one month in 1945.

Mr. Rubin: If your Honor please, Mr. Lackyard has signed several of the contracts. He signed, for example, Government's Exhibits 332 and 334.

The Court: What are they?

Mr. Rubin: They are, I believe, the Newport contracts. I have a number of documentary exhibits that are indicative of admissions against interest.

The Court: Yes, I remember.

Mr. Rubin: And he was present at numerous meetings, and there was also oral testimony as to him. [3303]

The Court: I remember. I think that is probably sufficient to hold them.

On the question of the union, the by-laws have been introduced, their articles and constitution and by-laws, however you may wish to describe them, and the power of the union appears in them to create a strike committee or an executive committee, and the action and conduct of the executive committee has been testified to, so I suppose that there is enough to hold the defendant union as well as the others. [3304]

* * *

The Court: I am inclined to make a final disposition in so far as I can as I go along in these matters, and in the event there is a disagreement it looks to me like it would have to be a determination, as counsel says, on the part of the government whether they are going to prosecute or not prosecute.

I think I had better make a decision the way I see the matter now, and the way I see the matter now is no different than I saw it at the conclusion of the government's case which is, under the rules applicable at this time for the making of such a motion, that I must deny the motion for a judgment of acquittal as to all defendants. That will be the judgment of the Court on the motion. [3305]

* * *

CONFERENCE ON INSTRUCTIONS

Los Angeles, California, May 1, 1947, 10:00 a.m.

(The following proceedings were had in chambers outside the presence of the jury:)

Mr. Margolis: I have these letters that we mentioned, your Honor. I have shown them to counsel while we were waiting.

I have here, first of all, a copy of Exhibit 230—this is our copy but it is No. 230 in evidence—and we want to offer the omitted portions. As long as we are on the record I will identify these other letters that we want to offer. [2*]

* * *

Mr. Dixon: I think it is all right. We will object just for the purpose of the record.

The Court: On the ground it is immaterial?

Mr. Dixon: That is right.

The Court: Objection overruled. The remainder of Exhibit No. 230, which are minutes of a joint central council meeting of March 2, 1946, 1:00 p.m., are admitted in evidence so that the whole document is in evidence.

(The portions of the document referred to were received in evidence and marked Defendant's Exhibit MM.)

Mr. Margolis: As I understand it, with regard to these documents that I am offering, there is no question about foundation, is that correct?

Mr. Dixon: That is correct.

Mr. Margolis: The next one is a document dated

*Page numbers appearing at top of page of Reporter's Certified Transcript of Conference on Instructions.

November 3, 1945, headed "Action by Fishermen's Union 36," signed G. Zafran, Secretary-Treasurer.

* * *

Perhaps I ought to have these marked first.

(The documents referred to were marked Defendants' Exhibits Nos. NN to SS inclusive for identification.)

Mr. Margolis: Your Honor, I have had a series of documents marked NN, OO, PP, QQ, RR and SS for identification; NN being the one previously referred to dated November 3, 1945. Suppose I hand them to counsel and as they read them they can hand them to your Honor. Would that be satisfactory?

The Court: Yes, I think so.

Mr. Rubin: With respect to Defendants' Exhibit NN, in addition to the general objection, we might further state, and in response to counsel's statement that it is offered for the purpose of showing the nature of the activities, we submit that whatever activities are indicated here could in no fashion tend to prove or disprove any of the issues in this case, even as to the nature of marketing, which I assume it is admitted for, although it may be offered for some other purpose. [5]

* * *

The Court: Very well. They will all be admitted.

(The documents referred to were received in evidence and marked Defendant's Exhibits Nos. MM to SS inclusive respectively.)

* * *

The Court: The defendants' original instructions were numbered. I took the first set of supplemental instructions and have numbered all other instructions as 1 and chronologically down through your second set. Will you take your second supplemental instructions?

Mr. Dixon: Those were the ones marked S-11.

Counsel numbering instructions to conform.)

The Court: Have we our mechanics straightened out now?

(Assent)

On the instructions to the jury, I will repeat to the jury the instructions which I gave them identically at the beginning of the trial first. [8]

Mr. Margolis: As I recall it, those were just the general instructions?

The Court: Those were just the general instructions about weighing evidence, and so forth.

I will then give the following instruction:

“The mere fact that a witness might have been connected with the United States Government in any capacity whatsoever does not mean that the testimony of such witness is entitled to any greater weight or credence by that fact alone. You will consider the testimony of any officer or employee of the United States Government the same as you would consider the testimony of such person if he were not so employed.”

Any objection to that?

Mr. Margolis: None.

The Court: One of the defendants did not take the stand, so I thought I should give an instruction in connection with that as follows:

“You are instructed that the mere failure of a defendant to testify in his own behalf raises no presumption against him and you cannot consider his failure to testify in arriving at a verdict.”

(Assent)

Then this is the general plan: I will take Government's [9] Instruction No. 10. I have already said that in my general instructions, but I will say it again, but I will lead from this directly into the indictment. Any objection to that?

Mr. Dixon: No.

Mr. Kenny: No.

The Court: Then the next instruction is one which I drafted here yesterday.

“The law under which the within proceedings are brought is commonly called the Sherman Anti-Trust Act. The pertinent provisions thereof are as follows (from Title 15, U. S. Code, Section 1):

“ ‘Every combination, conspiracy in restraint of trade of commerce among the several states or with foreign nations is hereby declared to be illegal; * * * Every person who shall engage in any combination or conspiracy’—I will

strike out "combination" there—"in any conspiracy declared to be illegal shall be guilty of a misdemeanor * * * ' and on conviction thereof, appropriate punishment is provided by the statute.

"You are not to be concerned with the punishment, or take it into consideration in your deliberations as that is a matter which is the exclusive responsibility of the judge in the event of a conviction. [10]

"You are not to be concerned with the reason for the law, or whether you regard it as a good or bad law. It was passed by that branch of the government charged with the responsibility of making laws. It is constitutional and it is the law of the land, and you must accept it as such.

"The indictment, which was outlined at length at the beginning of the trial by Government counsel, also in argument——"

He will have made the argument. I suppose you will do it again now?

Mr. Dixon: Yes.

The Court: "——charges in brief"——

And I am taking this from Paragraph 12 of the indictment.

"——that sometime prior to May 1946, the defendants engaged in a combination and conspiracy in Southern California to 'fix, establish and maintain arbitrary artificial and non-competitive prices for the sale to dealers of fresh fish and crustaceans caught in the waters

of the Pacific Ocean, both territorial and foreign, off the coast of California, from Morro Bay south to and including the territorial waters off the West Coast of Mexico, and to prevent dealers who did not agree to pay said prices from obtaining, selling or shipping any fresh fish or crustaceans, all in violation of the above-entitled Sherman Act.' The indictment goes into much more detail, but the foregoing is the essence of the charge to which you must respond with a verdict of either 'guilty or not guilty. You may have the indictment in the jury room if you wish so that you may see all of its terms.'"

Then I propose to follow that——

Mr. Rubin: May I interject for a moment? I think in the first portion you struck out the word "combination."

The Court: Yes.

Mr. Rubin: And in the quotation from the statute you also struck it out. The indictment does charge a combination and conspiracy.

The Court: I think I had better leave it in then.

Mr. Rubin: I think the quotation should have it in too.

The Court: Yes, because the indictment charges——

Mr. Dixon: I have the language right here.

The Court: I took the first clause: "Every contract, combination and form of a trust or otherwise or conspiracy in restraint of trade or commerce

among the several states or with foreign nations is hereby declared to be illegal." Now this hasn't anything to do with foreign nations, or does it?

Mr. Dixon: No. [12]

The Court: You are not alleging that it was a contract, so they shouldn't be confused with that. You are not alleging that it was in the form of a trust.

Mr. Dixon: That is right.

The Court: Or otherwise. You allege every combination or conspiracy in restraint of trade or commerce among the several states is hereby declared to be illegal.

Mr. Rubin: I think perhaps the language of "foreign nations" should be in because of the commerce element with respect to Mexican shipments, and the fact that fish does come from international waters.

Mr. Dixon: On second thought I think the indictment does charge it.

The Court: No, you allege the nature of the trade and commerce involved in paragraph 10, the fishing area, and I quoted that. I describe it and I take it from your quotation, "fishing area" refers to the waters of the Pacific Ocean both territorial and foreign.

However, I think probably that that had better be in.

I then propose to give Government's Instruction No. 7, followed immediately by Government's Instructions 16 and 17 and 8. They all relate to a general description of a conspiracy, what it is and why. [13]

Mr. Dixon: On going over Instruction No. 7, we suggest that possibly the language on lines 26 and 27 might be stricken.

The Court: On page 2?

Mr. Dixon: Yes. This is the part we suggest be eliminated, "if you find there was a dissolution or abandonment thereof," because I do not think that is an issue in the case.

The Court: I will state my notion on that. I noticed that in there, and if that were not in there I had intended again to give the instruction to the jury which I gave during the course of the evidence.

Mr. Dixon: That is the reason I suggest the withdrawal of this because you have already covered it.

The Court: I have covered it but I think it ought to be stated now, and in that connection there was some testimony by Kibre from which the jury might conclude that he had withdrawn from the conspiracy.

Mr. Dixon: That instruction, as I recall, related to whatever evidence, I mean, his statements could not be used, the statement of anyone who has withdrawn from a conspiracy could not be used against anyone else charged with being in the conspiracy under the rules of evidence we have referred to heretofore.

The Court: The rule as I stated it was, if they concluded that Kibre has withdrawn from the conspiracy, thereafter [14] statements by other conspirators cannot be binding upon him.

Mr. Dixon: That is right. And the converse of that is true also.

The Court: Or the converse of it, statements by him cannot be binding.

Mr. Dixon: Or used against anybody else. I think that was the rule recently decided in 329 U. S.

Mr. Rubin: Then I believe we also amplify that in stating that the withdrawal of a conspirator is no defense unless the withdrawal occurs prior to the 3-year statute.

The Court: It occurred to me that this statement here was sufficient to cover the whole situation so that the jury could conclude or not conclude as they deemed the fact to be, and it is sufficient without my giving the instruction which I gave during the course of the trial.

Mr. Margolis: We have two objections, your Honor. We are talking about Government's Instruction 7 at this point?

The Court: That is right.

Mr. Margolis: With regard to the second page of that instruction, the sentence on lines 1 to 3, we think under the circumstances of this case is likely to be misleading because it does not allow for a situation in which the purposes and objectives of the agreement between the parties are changed as of the time of the joining of the new party and where he only binds himself to those changed purposes and objectives. We think that there should be language in there to the effect, however, that this does not apply where at the time the person joining the conspiracy joins it only to achieve purposes and objectives different from those.

The Court: No, I don't think that that would be appropriate because the Government has set out here to prove a conspiracy to fix prices in restraint of trade. If thereafter it becomes a conspiracy for some other purpose, which is a legitimate purpose, nobody is guilty.

Mr. Margolis: Our objection is on the ground that this is subject to a misinterpretation.

The second objection, your Honor, is with relation to lines 19 to 22 of the same page of Instruction No. 7. We object on the following grounds, that the indictment does not state a cause of action and that therefore proof of the facts set forth in the indictment are not sufficient for any purpose. And, second, that even if the facts alleged in the indictment are proved it doesn't allow for the establishment of defenses such as the defendants were operating under the Fishermen's Marketing Act and exempt under the Clayton Act, and subject to the interpretation that if the government proves the facts set forth in the indictment that then the defense of the Fishermen's Marketing Act, and the defense of the Clayton Act and the defense of the rule of reason will not apply. [16]

The Court: On your first ground of objection, I have already passed on that.

Mr. Margolis: Yes, your Honor, we understand that.

The Court: As to the second ground of objection, I think that that is taken care of by subsequent instructions.

Mr. Margolis: Then I understand your Honor by that has ruled on our objection?

The Court: That is right.

Mr. Kenny: In the language offered by the Government on line 26, "if you find there was a dissolution or abandonment thereof," that is to go out, is it?

The Court: No, I am leaving that in because in following the testimony, and the only defendant witness to which it might possibly be applicable—I won't say that but I do recall distinctly that in Mr. Kibre's testimony it would be possible—for the jury to conclude that he abandoned the original conspiracy.

Mr. Margolis: Just as a matter of procedure, I assume after we have made objections and your Honor has ruled that it will not be necessary for us to repeat our objections in order to preserve our record?

The Court: In that connection, I think that the objection should be made in the presence of the jury but not argued. [17]

Mr. Margolis: The rules seem to provide——

Mr. Kenny: For outside the presence of the jury:

The Court: I know that, but the rule before the adoption of the new rules used to be that they had to make them in the presence of the jury, and they reversed some cases because the defendant's lawyers didn't make them in the presence of the jury.

Now while the rules are promulgated by the Supreme Court and they are presumed to be valid and

constitutional and regular, the occasion might arise when the Supreme Court might say, "Well, yes, we adopted the rule but it isn't any good." So I have followed the practice in all criminal cases where the objections have been stated at length that in the presence of the jury the defendants merely state that they wish to object to the instructions before the jury as outlined previously. In that way you preserve your record so that if at any time you need it you will have your record.

Mr. Kenny: So long as we make our record now in general terms.

The Court: Yes. You make your record now and your reasons and grounds for the objections. If you do not wish to do it, it is all right with me.

Mr. Kenny: It might be an act of caution.

The Court: It is just an act of precaution that I have pursued in the effort to protect the record for any defendant in case a situation should happen like in the Ballard case where seven years after the indictment was returned they suddenly discover that the grand jury was not properly constituted.

Mr. Margolis: Then we won't have to repeat the objection.

The Court: No. You will just make your simple statement, as I have indicated. In other words, I do not want to put the defendants in the position of possible prejudice to the jury by arguing about the instructions.

Now the next one is Instruction No. 16. Do you have that?

Mr. Margolis: Isn't that covered by No. 7?

The Court: No, I do not think so. If in connection with No. 16 you will also read No. 17 and No. 8, they are all of the same general nature.

Mr. Margolis: We would like to object to No. 16 and 17 on the grounds that they are covered by No. 7—and by No. 16 and No. 17 I am referring to Government's Instruction 16 and 17.

We would like to object to the last sentence of Government's Instruction No. 8 on the grounds previously stated, that it incorrectly states the law, that the indictment does not state a cause of action, and on the further ground previously stated that it may be misleading.

The Court: I think the last sentence can go out. It is repetitious. [19]

Of course it is a repetition which clarifies and seems to me to work to the advantage of the defendants in view of the first sentence. I think the first sentence should go in.

Mr. Margolis: We are not objecting on the ground that it is repetitive. Our objection is actually the same objection which was made to the cause of action, also that it may be misleading as to affirmative defenses.

The Court: Very well. That is overruled.

* * *

Now those are all of the preliminary instructions. We now come to the disputative part of the instructions, and I think perhaps the best way to handle that is to say that in considering all of the defendants' instructions I took in mind and had before me Government's Instructions Nos. 1, 2, 4, 5, 6, 3 and

15. Now in order that this may be referred to in the record I will lump all these instructions together under one, the general instructions, and will call this latter Court's Instruction No. 2.

Now before we go into the disputative matters, if you will take Government's Instructions Nos.—these instructions that are offered by the government I am pulling out as covered—they are, No. 9, 11, 12, 13, 14, 10—just a moment now. I believe I have the numbers mixed up.

Mr. Margolis: Your Honor has stated that you are going to give ten.

The Court: Yes. We might renumber these together.

(Renumbering instructions to conform.) [21]

Mr. Margolis: These matters that are covered by your Honor's preliminary instructions, as I remember.

The Court: Yes, I think so.

Mr. Margolis: As I remember, your Honor instructed on reasonable doubt.

The Court: Yes, reasonable doubt, and then I have a concluding instruction here. I will read that to you so we will get all these general matters out of the way. It is a rather long one. This will be the concluding instruction. This is a general one:

“There is nothing peculiarly different in the way the jury is to consider the proof in a criminal case from that by which men give their attention to any question depending upon evi-

dence presented to them. You are expected to use your good sense, consider the evidence for the purposes only for which it has been admitted, and in the light of your knowledge of the natural tendencies and propensities of human beings, resolve the facts according to deliberate and cautious judgment; and while remembering that the defendant is entitled to any reasonable doubt that may remain in your minds, remember as well that if no such doubt remains the government is entitled to a verdict, for to the jury exclusively belongs the duty of determining the facts. [22]

“You are instructed that if the judge has said or done anything throughout the trial or in these instructions which has suggested to you that he is inclined to favor the claims or position of either party, you will not suffer yourselves to be influenced by any such suggestion. The judge has not expressed, nor intended to express, nor intimated or intended to intimate any opinion as to what witnesses are or are not worthy of credence, what facts are or are not established, except the facts which have been stipulated to by the parties throughout”—— Well, I haven't done that. “——or what inference should be drawn from the evidence adduced. If any expression of the judge has seemed to indicate an opinion relating to any of these matters I instruct you to disregard it.

“You should not consider as evidence any statement of counsel made during the trial or

argument unless such statement was made as an admission or a stipulation conceding the existence of a fact or facts. You should not consider for any purpose any evidence offered and rejected, or which has been stricken out by the court. Such evidence is to be treated as though you had never heard it. You are to decide this case solely upon the evidence that has been admitted by the court and the inferences that you may reasonably draw therefrom and such presumptions as the law may deduce therefrom, as given in these instructions.

“It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to your individual judgment. To each of you I would say that you must decide the case for yourself, but you do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, none of you should vote either way, nor be influenced in so voting for the single reason that a majority of the jurors are in favor of such a conclusion. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors.

“Remember that you are not partisans or advocates in this matter, now you are judges. The final test of the quality of your service will

lie in the verdict which you return to this court room and not in the opinions which any of you may hold as you retire. Have in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict in this case, and to that end the court will remind you that in your deliberations in the jury room there can be no triumph excepting the ascertainment and declaration of the truth.

“And after the bailiffs are sworn you will retire,” and so forth.

Mr. Kenny: Elect a foreman?

The Court: Yes.

Do you have the notes of those I have withdrawn as covered?

Mr. Dixon: Yes.

The Court: Is there any objection?

Mr. Dixon: No.

The Court: All right. Now, do you have any objection to the court's instruction No. 2?

Mr. Margolis: None.

The Court: Very well. I am taking up the defendants' instructions, and have the government's there beside you, because you will wish to refer to them.

Mr. Rubin: Which are you going to consider first, Judge?

The Court: I am going to consider the defendants'.

Mr. Rubin: Which of the three sets?

The Court: In their order, 1, 2, 3. I have them numbered chronologically, and then the S-1 supplement and so forth. We will start with No. 1.

Mr. Kenny: This is in the order in which they will be given that you are indicating?

The Court: All these that I have considered heretofore will be given first, to this point. From this point on——

Mr. Kenny: Are you indicating the order in which you are going to give them now?

The Court: Yes.

Mr. Kenny: O. K.

The Court: Well, I don't know. I have laid out here in the government's instructions, 1, 2, 4, 5, 6, 3 and 15, in that order. Now, taking the defendants' No. 1, I have covered conspiracy pretty well, but if the defendants want that instruction given I think it might well be given along with the other instructions on conspiracy.

Mr. Margolis: We would like to have it. There is a sort of evil connotation about the word generally understood.

The Court: All right. I will give that, then, immediately following government's No. 8. [26]

Defendants' No. 2 and No. 3 seem to me to be immaterial.

Mr. Margolis: Do I understand that your Honor's ruling is that they will be——

The Court: Declined on the ground that they are immaterial.

Mr. Margolis: Is it necessary for us to state that we object——

Mr. Kenny: The fact that we offered them——

Mr. Margolis: In order to make our record entirely clear, we state that we object to the refusal to give the instructions on the ground that we believe them to be material.

The Court: I have got them all lined up here, and maybe you can make your objection at the end.

Mr. Margolis: Very well, your Honor.

The Court: No. 2 and 3 I regard as immaterial.

Instruction No. 4, I am a little puzzled about. I don't know whether the offered instructions by the government cover that or not. I think No. 4 is not a correct statement, and defendants' supplemental 12—no. Wait a minute. There is another instruction that you offered that I thought might be modified or combined with defendants' No. 4. That is No. 15. The general idea I don't think is covered in either one of them, but it is suggested by them, and I don't think it is covered by the government, and the general idea is this: that the defendants are not charged here and it is not a violation of the law to interfere with the business of any individual dealer or dealers. What they are concerned with is an interference with the general commerce in fresh fish.

Mr. Rubin: We prefer the word "restraint," if your Honor please, in the language of the statute, because "interference" connotes a physical diminution.

The Court: "Restraint" then.

Mr. Rubin: Yes, I think the word "restraint" explains it.

The Court: I think No. 4 will be rejected and No. 15 rewritten as 15 to take its place.

* * *

The Court: Now, wait a minute. Let me see this now as I have it. The last sentence can go out. All right. Here is the suggested change or form:

“I instruct you that any alleged or proved restraint by one or more of the defendants with the business of any so-called individual fish dealer or dealers mentioned in this case is not the controlling factor to be considered by you in arriving at your verdict in this case. The government must prove a conspiracy to restrain in a substantial way the interstate or foreign commerce in fresh fish, and that is the basis of the charge presented to you.” [29]

That, then, will follow Defendants' No. 1 which follows government's No. 8.

Mr. Margolis: May I say a word about 4, your Honor, because it will get lost in the shuffle if we wait until the end?

The Court: Yes.

Mr. Margolis: I think that the instruction in the original form in which it was proposed by the defendants is incorrect, because——

* * *

Mr. Margolis: Because it, in effect, says that there must be a direct effect upon interstate commerce, whereas we are dealing with an agreement

and the effect is immaterial. We would, therefore, like at this time to ask leave to amend the proposal to read as follows: [30]

“I further instruct you that in this case the government must prove as one of its main contentions,”—I would strike “as one of its main contentions”—“must prove that the alleged agreement entered into between the defendants had”—and here I would insert the words “as its intended result,” so it would read, “that the alleged agreement entered into between the defendants had as its intended result a direct effect upon interstate commerce.” And then in the last sentence on line 11 we would strike the word “its” and substitute “such” and the word “is” and substitute “would be” so that the last sentence would read: “And further, even if you should find that the agreement may have an effect upon interstate commerce, if you find that such effect upon interstate commerce would be only indirect or incidental or remote to such commerce, then you should find all the defendants not guilty.”

We ask leave at this time to amend our instruction in that way.

The Court: I think that instruction might be given following the one that I just indicated.

Mr. Rubin: If your Honor please, we would object to the instruction as amended, as proposed to be amended, on the [31] ground that it would indicate to the jury that there must be an intent

to restrain commerce, and that, of course would imply a specific intent which is not and has not been an issue in this case.

The Court: That is this case the government must prove that the alleged conspiracy——

Mr. Margolis: I think there is something to what the government says.

The Court: “I further instruct you that in this case the government must prove”——strike out “as one of its main contentions”——“that the alleged.” instead of “agreement entered into between the defendants,” because that implies that I have decided that they did enter into an agreement, says that the alleged conspiracy had for its object——

Mr. Margolis: That would do it.

The Court: That the alleged conspiracy had for its object, or would have had?

Mr. Rubin: The object, if your Honor please, is determined from the facts, not from a specific finding of the jury. All that we have to show is what they did, and we don't have to show that they did that for any particular purpose. If for any purpose they did these things that constituted a restraint of trade.

The Court: That is what I say——no, not that it constituted a restraint of trade, but they formed a conspiracy to restrain [32] trade.

Mr. Rubin: That's right, without regard to the purpose, however.

The Court: That the alleged conspiracy would have had a direct effect upon interstate commerce in fresh fish.

Mr. Rubin: How would it read, then?

The Court: "I further instruct you that in this case the government must prove that the alleged conspiracy would have had a direct effect upon interstate commerce in fresh fish."

Mr. Rubin: The question of direct and indirect effect, if your Honor please, particularly under the cases cited here, are those in which there is no price fixing involved, and as we have discussed before where there is price-fixing, where that is the matrix of the charge, the question of the effect is a matter of law and not to be determined by the jury.

These are labor cases that are cited down here, and just as in the second Coal case the question of the direct or indirect—as a matter of fact, this instruction is an Apex v. Leader instruction where the question of direct and indirect effect is construed; not a price-fixing instruction. That is our objection to that.

The Court: Here is the thought that I have in mind in connection with the matter, and in my notes I merely put a [33] question mark about it: Suppose the defendants conspired to fix the price on something that was not moving or didn't move in interstate commerce, it wouldn't be a violation of the law.

Mr. Rubin: That is correct.

The Court: Therefore it either must move in commerce, must have a direct effect on commerce, or directly move in commerce or something. In other words, the jury has got to find, as a matter

of fact, that there was interstate commerce in fresh fish before they can find an agreement to fix prices restrained that interstate commerce.

Mr. Rubin: We would have no objection to that kind of instruction.

The Court: That is what I am trying to get here. Give me some ideas.

Mr. Kenny: I can cite *Lowe v. Lawler* as authority for that, your Honor.

The Court: That the alleged conspiracy——

Mr. Rubin: I think this might be adequate: That the subject of the conspiracy—that the trade and commerce which you may find to be the subject of conspiracy must be interstate commerce.

That is something else that has a direct effect on it.

The Court: Suppose, now——

Mr. Margolis: It is all right the way it is. [34]

The Court: Let's say this: Suppose that one fisherman and one fish dealer entered into a contract to fix prices, I don't think you could get a conviction.

Mr. Rubin: That is correct, if your Honor please, and that is the reason——

The Court: Because it wouldn't affect interstate commerce. It would be trivial, remote, incidental.

Mr. Rubin: And that is the reason that your Honor changed the language in the previous instruction to state to effect in a—commerce in a substantial way.

That was the purpose of that instruction. Now, that has to do with the amount of the commerce, the substantial amount of the commerce.

This instruction has to do with the nature of the effect of it.

When you talk about direct or indirect effects, then you are talking about something that is contemplated in the Apex case, and not a price-fixing case.

Mr. Margolis: Let's assume, your Honor, that there was a contract—the reason we want direct or indirect, let's assume there was a price-fixing agreement which affected only products in intrastate commerce, but indirectly that price-fixing agreement would result in affecting the prices of commodities moving in interstate commerce.

The Court: Then it would be within the law, it would [35] be within the inhibitions of the Sherman Act. That has been true ever since—what is the name of that railroad case that Chief Justice Hughes wrote the opinion?

Mr. Margolis: If that was part of the plan. But let's assume that the only effect was that the people competing would raise their prices because they say, "Well, we will raise our prices because you have raised yours."

The Court: Let me study this a minute here.

Mr. Dixon: I think it has already been covered, Judge.

Mr. Rubin: That covers the volume of commerce.

The Court: I think maybe that other instruction, S-15, would cover the idea I had in mind. I considered the two together, and I thought out of the two of them there ought to be some statement—

Mr. Dixon: 15 covers it, your Honor.

The Court: I think it does. All right. We go to defendants'—

Mr. Margolis: At this point, your Honor suggested we wait until the end, but because as we discuss them it would be rather difficult—

The Court: All right, if you have a special objection, make it.

Mr. Kenny: First, I would just suggest if 15 is only to be given, that the second sentence read: "The government must prove a conspiracy"—

Mr. Rubin: 15?

Mr. Kenny: S-15. "The government must prove a conspiracy to restrain in a direct and substantial way."

The Court: No, it doesn't have to be direct.

Mr. Margolis: With regard to defendants' instruction No. 4, we want to show that our objection to the refusal to give that instruction is an objection to give the instruction in the manner that it was last worded by your Honor, not as originally phrased by us.

Do I make myself clear on that point, your Honor? In other words, we object to the failure to give an instruction reading as follows:

"I further instruct you that in this case the government must prove that the alleged conspiracy would have had a direct effect upon interstate commerce in fresh fish * * *"

The Court: All right. Defendants' No. 5 is covered in that in my judgment, as I have stated, by this instruction over here the jury is not concerned with the reason for the law or whether they regard it as a good or bad law, or whether it is good or bad. All these matters, it appears to me, in No. 5 and a number of other instructions which I will indicate, would put me in the position of arguing the case to the jury. In other words, what I have got to do is to state the law without that, which I think I have done. So [37] No. 5——

Mr. Margolis: We would like to have your Honor consider as a separate instruction, as though it were two instructions, paragraphs 1 and 2 of Defendants'—they are not numbered 1 and 2, but the two paragraphs of defendants' proposed instruction No. 5.

The Court: The second paragraph there I think is not a correct statement of the law, completely correct, and is covered by the government's instruction No. 5, which I think sets up fully and fairly and accurately the law with relation to the defendants' contention that they are a labor union, and I deem it to cover a great many of the instructions offered by the defendants.

Mr. Kenny: I just submit this to the court, that this is a statement of Section 6 of the Clayton Act, which I think your Honor, if you read Section 1 of the Act, should also read to the jury.

* * *

Mr. Rubin: That is not Section 6 of the Clayton Act. It may be a paraphrase of it.

Mr. Kenny: It is a paraphrase of it. If the paraphrase is not to be given, then we would like to have at least the section itself read. [38]

Mr. Rubin: I don't even think that it is a paraphrase.

Mr. Kenny: Do you have any objection to the reading of Section 6 of the Clayton Act, and it becomes 17 of the Sherman Act as they piece it together in the book the judge has before him?

Mr. Rubin: I think you proposed that, and may I suggest we defer that until we come to the discussion of the instruction?

The Court: All right. I will set that aside here.

Mr. Rubin: No. 5, if your Honor please, we submit isn't even a paraphrase of the Clayton Act. We submit that is entirely inapplicable. It states what the Act does not provide.

Mr. Kenny: I think we can waive paragraph 2, all right, if we had our instruction No. 11. That is the first 11. It is not the one marked "S-11."

* * *

The Court: I am wondering if I couldn't read that at the beginning of Government's No. 5

Mr. Kenny: That is, read Section 6 of the Clayton Act?

The Court: Yes. [39]

Mr. Kenny: That is what we asked for.

Mr. Margolis: We would object to that because we think that is inconsistent with government's instruction No. 5, because government's instruction No. 5 we think treats the law as though in order to come within the exemption of the Clayton Act

you must be a labor union, whereas it is our contention that the Clayton Act itself makes any labor not a commodity and exempts labor regardless of whether the organization is in the form of a labor union or not; and, therefore, we say the two are inconsistent.

Mr. Dixon: Section 6 of the Clayton Act standing alone, your Honor, is entirely too broad to have any meaning, unless placed in the context of the issues of fact in the case before the court. It is only in that light that it can be given any meaning, and it is in that light that it has been construed by the Supreme Court.

* * *

Mr. Margolis: I would just like to say this: In the Hinton case a conclusion was reached based upon what amounted to practically stipulations. In the Hinton case there wasn't [40] any question of determining upon the basis of evidence as we have tried to have it determined here just what the exact status of these people were, but the effect of it was,

"Sure, we come in and we admit that we are independent business men," and so forth. The whole record shows that that issue was never tried out, and, therefore, to give an instruction based upon the Hinton case as though the issue had been tried out in the Hinton case, when it wasn't, prevents us from trying out the issue in this case.

Mr. Kenny: As though the issue in the Hinton case were identical with the issue here.

Mr. Rubin: The question is what the legitimate objectives of labor may be and whether or not they

are immune, and we have argued that time and again. Judge Kenny has argued that labor is per se exempt regardless of whether they are a labor union or not. That has been argued.

Mr. Kenny: I have never argued that labor per se is exempt.

The Court: I think No. 5, if Section 6 is read, would not be subject to the objection which you have offered, because the last sentence of Section 6, or Section 17—do you have it before you?

Mr. Margolis: Section 6 of the Clayton Act, which is Section 17 of the Sherman Act?

The Court: Yes, the last sentence reads: “nor shall [41] such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, * * *”——

Mr. Margolis: Our contention is that refers to organizations in which labor is what being dealt with, labor is actually the commodity. We think that at least upon the basis of the presentation here the jury has a right to determine, as a matter of fact, whether boats which are being used are the investment, or whether they are merely the tools that are being used, and substantially what is being sold here are the products of labor and not of any invested capital. That question of fact was never presented in the Hinton case, was never resolved, because the facts weren't presented.

The Court: If you wish I will read Section 6 of the Clayton Act just prior to government's instruction 5, and I think that 5 doesn't prejudice your conception here that not only under Section 6

are labor organizations exempt, but under Section 6 individuals are also exempt, because it says here, “* * * not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations * * *.” Every defendant here is a member of this organization, and you have to have some relationship in your instruction to the facts in the case.

Mr. Kenny: Section 6, then, of the Clayton Act would be [42] read following—

* * *

The Court: No. Section 6 of the Clayton Act would precede the reading of government's No. 5.

Mr. Kenny: But the last instruction you indicated you would give, if the court please, is S-15.

The Court: Wherever I fit in Government's No. 5, that will be. I don't know where I will go from here.

* * *

Mr. Kenney: Defendants' proposed instruction No. 5 is, therefore, refused over our objection?

The Court: Yes, that's right.

* * *

Mr. Margolis: Does your Honor think we can finish?

The Court: I think we can, because a great many of these are going to fall in the same category. No. 6. [43]

Mr. Kenny: That is defendants' 6?

The Court: Yes. The rule of reason I don't think applies in a price case.

* * *

Mr. Kenny: We concede that it would not under the Socony Vacuum, because it would not apply to a price case where the price to consumers was affected, and whereas in that case there was support buying and factors of that kind. But we urge most vigorously that the rule of reason does apply to original producers where consumer prices are not affected.

The Court: You have touched that in a number of other instructions, but I can't agree with you. I think that the rule of reason does not apply in a price case, and that was definitely settled by Socony Vacuum, so No. 6 will be refused.

Mr. Rubin: That is, if your Honor please, that the rule of reason, as I understand it, applies except with respect to price fixing it is per se unreasonable?

The Court: It does not apply in a case where your evidence and everything goes to a conspiracy to restrain trade by fixing prices. Or saying it shortly: It does not apply in a price case.

No. 7, in the things that are related it is covered, and in the other things it is not in the case. [44]

Mr. Dixon: That's right.

Mr. Kenny: I think, your Honor, that is an attempt to overcome an interference that they are accused of violating Section 2.

Mr. Dixon: The indictment speaks for itself.

Mr. Kenny: If it does we are entitled to have it spelled out.

Mr. Rubin: They are not accused of doing a lot of things.

The Court: I will read the particular section of the law and the indictment of what they are accused of doing. I think this: In the portions that it does relate it is covered, and otherwise it is confusing and immaterial.

On No. 8, it seems to me that all of the matters set forth in it are immaterial, except, possibly, your subparagraph 7 and maybe 11, and 7 is covered otherwise.

Mr. Rubin: With respect to 11, we submit the question of diminution or increase is immaterial.

Mr. Margolis: Does your Honor take the position—I just want to get this clear—there is, of course, this law to the effect that fish may not be allowed to deteriorate, that is the California law,—is it your Honor's position that a combination for the purpose of achieving that objective cannot be defended under the Sherman Antitrust Act if it results in a diminution or restraint of the flow of fish? [45]

The Court: Let me answer your question by saying this: It seems to me that all of that is immaterial in connection with the charge made here that they conspired to restrain the commerce in fresh fish by fixing the price in the manner charged in the indictment. In other words, they can have the law regulating it in California and you can have all these other things still true, and it is all immaterial in connection with the charge whether they did or didn't.

Mr. Margolis: Here there is a regulation which makes it mandatory upon these fishermen to prevent the destruction of fish. Is it an interference with commerce to take steps to prevent—to further conserve?

The Court: I don't think that is material. I will [47] refuse the instruction in its entirety. Paragraph No. 7 I think is covered by other instructions, and Paragraph No. 11, about which there was some question in my mind, I think should not be given because the charge is not made that they seek to limit the production of fish. The whole thing is a price case, and could not be appropriately brought into argument by the government other than to argue to the effect that by limiting the price they would limit the production by preventing any production. In other words, "Our price or no fish."

* * *

Mr. Kenny: Just before that, and while it is fresh in the court's mind, would not, then, we be entitled to an instruction that the defendants are not charged with limiting the production of fish?

The Court: No. I don't think so.

Mr. Margolis: If your Honor please, one more matter on that. We contend from a series of exhibits, particularly W-2, which got in, and some other exhibits——

Mr. Kenny: W-1.

Mr. Margolis: W-1, I guess it is, that the entire purpose of the defendants, the real objective of the defendants——

The Court: Let me get in mind W-1.

Mr. Margolis: W-1 as the letter which called off the picketing. [48]

The Court: Yes.

Mr. Dixon: It is the June 30th letter.

Mr. Margolis: And other evidence, the testimony of witnesses, and also the June 11th exchange of letters, and so forth, that the real objective of the defendants was to set up a procedure whereby they would know before they went fishing what price they would get for the fish on that trip, in other words, that they wouldn't have to go out and fish blind, and that the agreement that was proposed was merely one means of obtaining their objective, and that the real thing that they were after, the real purpose of the agreement among the fishermen was to know what price the fish was before they went fishing. And then I direct your Honor's attention—whether the evidence says that or not is, of course, a question for the jury to determine—to point 6 of proposed instructions No. 8: “whether it is reasonable for fishermen, whose labor is rewarded by the price at which their catch is sold, to know and determine in advance the basis, or rate, at which they will be compensated.”

The Court: That goes to the reasonableness.

Mr. Margolis: Maybe the word “reasonable” there shouldn't be used, but I think there should be an instruction to the effect that if the purpose of the agreement among the defendants was to establish some system by which they would know and determine the rate at which they would [49] be compensated, that that is not necessarily a violation of the antitrust law; that that purpose is not.

Mr. Dixon: That is just the point. It certainly is. It couldn't be anything but a price-fixing agreement.

The Court: I think if an individual fisherman under the government's theory of this case negotiated with each one a separate contract, that it would not be a violation of law. Their theory is that they combined and conspired that every fisherman should do that or not fish.

Mr. Margolis: One of the things the June 11th exchange of letters provided was it would negotiate separately for each individual fisherman with simply the union representing them in those negotiations, for each individual trip. We have that evidence in there. Does the mere fact that the individual for whom the negotiations are being conducted is represented by a union in those individual negotiations make it a violation?

The Court: I think that is covered by the government's instruction here on the Fisherman's Marketing Act. I will decline 8. Let's get on.

No. 9 Let's set aside No. 9 for a moment.

No. 10 I think is covered by government's 5.

Mr. Kenny: What are you setting aside?

The Court: No. 9. You have three instructions in there all relating to that same matter. I thought when I [50] got to the last one that we would take the three of them. The subject-matter is a matter upon which I think the jury should be instructed.

No. 10 is declined because I think it is covered and is not a correct statement of the law. In other words, it goes on to the proposition that the defend-

ants are workers, which I think is covered by the government's instruction No. 5 with the reading of that section of the Clayton Act.

No. 11 is the same idea.

No. 12 is covered by the Marketing Act instruction of the government, which is government's No. 4.

* * *

The Court: No. 12 I think is covered by the government's instruction No. 4. That is to say, I think that the subject-matter is covered by government's instruction No. 4. Your position is not the same as that taken by the government.

No. 13—

Mr. Margolis: No. 12 is refused, your Honor?

The Court: Yes. No. 13 I think is an incorrect statement of the law and is declined.

Likewise No. 14. That is the original producers, a subject we were discussing a while ago.

* * *

Mr. Kenny: That, of course, goes to the heart of our contention that the law is designed to restrain activities of middlemen and not as against producers.

The Court: That I cannot agree with.

On that matter, as I say, I think it is an incorrect statement of the law, so it is declined.

* * *

Mr. Kenny: We would like to amend our proposed 14. On line 11—

Mr. Margolis: First of all, line 5.

Mr. Kenny: Yes, to insert the word "working" before "producers."

The Court: On line 5 and 11?

Mr. Kenny: Line 5, and then on line 6 insert "working" fishermen, and on line 11 insert "working" before "producers."

Then I think we would like to offer separately the last sentence of instruction No. 14 as an instruction.

* * *

No, it is still declined.

No. 15——

Mr. Dixon: Well, that is wholly incomplete, Judge. The difficulty with that is——

The Court: The subject-matter is covered generally.

Mr. Dixon: That's right.

Mr. Kenny: We would like to amend the proposal to strike out the word "as" in line 3 and put in lieu thereof the word "working."

The Court: 15 is refused.

16 is of the same general nature and is refused.

Mr. Margolis: May we just look at it for a moment, your Honor?

The Court: 17 again goes into reasonable return and we have discussed that general subject-matter. It is refused.

18 I think is covered by Government's 5 and the section of the Clayton Act, the subject-matter of it.

Mr. Kenny: Wouldn't that serve to clarify the naked language of the Clayton Act when it was read?

Mr. Rubin: It is not going to be naked; it is going to [53] be followed by Government's 5.

Mr. Margolis: This deals with individuals. If Government's 5 is proper to deal with organizations, to clarify and extend the language on organizations, this ought to be proper to extend the language with regard to individuals, what they may do.

Mr. Rubin: That doesn't follow, in my opinion.

Mr. Kenny: This goes to the activities as individuals.

Just for digression, Section 17 of the Clayton Act represents Senator Cummings' amendment which went to the simple language that the labor of a human being should not be an article of commerce. Then the balance of it was the House Committee Amendment that was worked up on a Sunday afternoon affecting labor, agricultural and horticultural organizations. There are those two phases in Section 17. This goes to the Cummings Amendment to the Clayton Act.

Mr. Rubin: If your Honor please, that again goes to the question of whether laborers are exempt under the provisions of the Act as such. That is all the second paragraph refers to. The first paragraph states the contention, so that isn't any law; and the second one, which apparently is an attempt at a statement of law——

The Court: I think 18, the subject-matter, is covered, as I view the law, in government's 5 and the reading of the Clayton Act. [54]

19 I think is an incorrect statement of the law.

Mr. Kenny: I think there we would like to insert "working" on line 5 before the word "producers."

The Court: All right. 19 is declined.

20, I think the general idea is all right, except the last sentence, “* * * then it is your duty to immediately find such defendant or defendants not guilty.”

* * *

Mr. Kenny: We will be glad to withdraw the word “immediately.” Where is that?

Mr. Margolis: Line 24.

The Court: The subject-matter is covered, but if you want it I can put it in again.

* * *

Mr. Margolis: Does your Honor want to indicate at what point that will be given, or do you want to leave that until later?

* * *

The Court: I think that can go back in our general instructions.

Mr. Dixon: That could go after Government’s 8, your Honor.

Mr. Rubin: It is repetitive of 8.

The Court: It is repetitive. I will strike out the word “immediately.” I will make that following 8 and before defendants’ S-15.

Mr. Margolis: Before defendant’s 1, then, or after defendants’ 1?

The Court: S-15.

Mr. Kenny: Defendants’ 1 has so far been indicated as coming ahead of—there is 8, and then 1, and then 15. But you will probably put it after 8, that would probably be the place.

The Court: Yes, it follows 8, government’s 8.

Wait a minute. Government's 8, defendants' 1, and defendants' 20. It will follow defendants' 1.

Mr. Kenny: Very good.

The Court: Coming to the "S" instructions.

Mr. Margolis: Now we are in a bad spot. Mr. Andersen has all of our copies.

Mr. Kenny: We can work it out here.

The Court: S-1, "You are"—you don't need to take this. [56]

(Court reading the instruction referred to.)

The Court: I think it is incorrect, and I think it is confusing, and the O.P.A. didn't mean that people had to charge the top prices.

Mr. Kenny: That is true, but the Emergency Price Control Act said that the prices set by the O.P.A. and the Administrator should be governed, that he should put prices at a fair and equitable level, taking into consideration these factors: costs, profits, and the public interest. And the jury should be told, we believe, that an agreement merely to obtain merely what the law told the Administrator of the O.P.A. to get, that those prices, even if your Honor should leave out—we would offer the first sentence separately, your Honor.

The Court: I don't think so. It was not the conception, as I view the Office of Price Administration, Emergency Price Control Act,—and I have certainly had it argued plenty before me—that they intended to establish uniform prices. They intended to establish maximum prices.

S-1 is rejected.

S-2 is the same subject-matter as your No. 9, and I will lay that aside. Your original No. 9 That is about picketing.

* * *

The Court: S-3, there isn't any evidence here about a row between the American Federation of Labor and the Congress of Industrial Organizations of a substantial nature, and it seems to me it would be confusing.

* * *

Mr. Margolis: We will withdraw that.

The Court: All right. Withdraw it.

S-4: Incorrect. And the subject-matter is covered by government's No. 4.

Mr. Kenny: Is it incorrect to say that they are in the same economic category as agriculturalists and horticulturalists?

The Court: That is an argument. No. 4 is declined.

S-5 covered by government's No. 5 and the Clayton Act. You have got your working producer in there.

S-6— [58]

Mr. Kenny: S-6 has this virtue, the naked reading of the Act does not include an instruction such as the government will get on their No. 5 when that is read. That is the last paragraph: "If you find that the defendants acted as members of an organization in which labor was the basis or one of the chief factors, they did not act in restraint of trade," and so forth.

The Court: No, I think that it is incorrect.
S-6——

Mr. Kenny: Could I amend the proposal?

The Court: Surely.

Mr. Kenny: On line 20 of S-6, strike out the words "they did not act in restraint of trade, and."

Mr. Dixon: It is still not a correct instruction in our judgment, your Honor.

The Court: That is covered by government's 5, the subject-matter is.

Mr. Kenny: There is nothing in government's 5, if the court please, that tells anybody that they should find anybody not guilty, and that is what we want. Furthermore, we would like—the ever-cautious Mr. Margolis suggests, and I will comply, that we should offer each paragraph of S-6 as a separate instruction.

The Court: All right. S-6 declined as amended.

S-7, the subject-matter is covered by government's 4.

Mr. Kenny: But there again this gives the factors which [59] would—what about the last paragraph, "You should ignore the evidence relating to picketing and boycotting"?

The Court: That is the subject-matter of your No. 9, and S-2 and your S-9, which I will get to in a moment.

Mr. Margolis: I just want to make one suggestion, your Honor. I think that the defendants' instructions should be considered from the standpoint of whether they are correct or not; not whether they are covered by the government's instructions, because——

The Court: The subject-matter is covered by the government's instruction is what I mean to say, and——

Mr. Margolis: My point is that the government naturally tried to state the instruction in a way most favorable to itself.

The Court: I thought they were pretty fair.

* * *

Mr. Margolis: May I state there is a difference of opinion on that. But we do think that this ought to be considered as to whether it is a correct statement of law, and if it is, then the mere fact that it is covered by one of the government's instructions should not mean that we have to accept the government's statement.

The Court: Maybe I did not make myself clear. When I say that it is covered by the government's instruction, what [60] I mean to say is that the subject-matter is an appropriate one to instruct the jury on, that the subject-matter is covered by the government's instruction, and I think correctly stated by the government's instruction No. 4.

Mr. Margolis: And incorrectly stated in ours, your Honor? Because I think the latter is the real question that I think your Honor should consider.

The Court: Your statement of the—it isn't correct in that it isn't completely correct.

* * *

Mr. Kenny: We will offer each paragraph separately, in addition, your Honor. [61]

* * *

The Court: I think the government's position there is correct. S-7 will be declined.

S-8. It generally states your position about the independent working producers in another way.

Mr. Kenny: Your Honor, it also does this: I wrote that after I read the government's proposed 5, because the government is leading your Honor right into the teeth of the N.L.R.B v. Hearst and Milk Wagon Drivers' case.

The Court: The Milk Wagon Drivers' case I didn't think applied. I got it out and read it again this morning.

Mr. Kenny: They were sellers. It occurs all the way through. You have got insurance salesmen who are in unions. Many of the Teamsters' groups are not on any regular pay roll; they are dependent upon commissions entirely. And this position of the government's that you have to be on a regular pay roll would have the most far-reaching effects on dozens of instances that are conceivable where there is organization.

The Court: As I see the government's position it isn't precisely that. It is that and that the buyers of fish don't control the fishermen; they don't control where he fishes [62] or when he fishes.

Mr. Dixon: Right.

The Court: And in these other cases as I read them there is sufficient measure of control to have warranted the conclusions that they were labor unions.

Mr. Kenny: I cite also Dubinsky's union has

many units in the Ladies Garment Workers who work at home, who are piece workers and work on materials.

Mr. Dixon: There is always in those cases an element of control, such as getting the material from them. It is the property——

The Court: Yes, I got them both down this morning and read them again, because his instruction——

Mr. Margolis: Isn't that a question of fact here on which we are entitled at least to the instruction? There are elements of control. What the market dealers will take. We found the relationship here often exists of debtor and creditor out of which we contend certain elements of control exist. There are all sorts of factors which actually result in control. Now, whether that control brings it within this rule or within the other rule depends upon the findings of fact as to control. We contend there is a great deal of control as a practical matter; that there is complete dependence.

Mr. Kenny: Plus the difference in bargaining power——

Mr. Margolis: That is the heart of the Hearst case. [63] And we think at least an instruction ought to be given on the question of law and let the jury determine it.

The Court: It may be on No. 5 of the government's instructions, that there should be some modification to the statement therein about the relationship of employer and employee.

Let me lay that aside.

S-9, I will lay that aside to take up with your No. 9 and S-2. That again has something to do with picketing and boycotting.

S-10. The subject-matter is covered by the government's 5, which I think correctly states the law.

* * *

Mr. Kenny: We would like to amend S-10 by striking out the sentence on lines 7 and 8.

The Court: "If Local 36 is in fact a trade union, the defendants should all be acquitted by you"?

Mr. Kenny: Yes. And insert in lieu thereof "If they are acting solely in self-interest and not in collusion with other economic groups.

The Court: You should acquit the defendants?

Mr. Kenny: Then on line 17 insert the same language that I inserted, after the words "labor union," insert that language, and then I would strike out the words "to so find," [64] in line 17, strike out "so find, and". "it is your sworn duty to acquit the defendants."

We offer S-10 as amended both in its entirety and each paragraph and sentence separately.

The Court: All right. That is declined.

Now, S-11, that is the text of the Fishermen's Marketing Act. I don't know. I have a question mark there. I am wondering if that ought not be read just prior to government's No. 4. In other words, give it the same treatment. Any objection to that?

* * *

Mr. Margolis: Reading the Act just by itself doesn't mean anything.

Mr. Dixon: I thought the judge stated he would treat this the same as he did the other, which would put—I mean the law, the terms of the statute—before the instruction.

The Court: I think the latter part of that can go out here, but something might be said about the fact that the jury can acquit the defendants at the end of the other charge, and I will insert that to be read here and to be considered when we get to the government's. So your S-11, that portion of the Act will be read just prior to 4, Government's 4.

Mr. Kenny: In its entirety, your Honor?

The Court: Except the last paragraph on that page, and we will discuss that when we come to government's 4.

Mr. Kenny: Very good.

The Court: S-12, well, that is the same notion. I think the subject-matter is correctly covered by the government's 4 and your S-11.

Mr. Kenny: It will be if No. 4 is amended, your Honor. You see, we have cited the Stark County case and the other [66] cases covering collective bargaining associations and the government's 4 does not give us the benefit of that determination. If No. 4 is amended——

The Court: Your S-12 is a different view of the law than the government's 4.

Mr. Kenny: That's right.

The Court: And I think the government's 4 more nearly correctly states the law, as I view it.

Mr. Kenny: In other words, it is your Honor's view that a collective bargaining group that bar-

gains for future prices to be paid its members for commodities to be delivered directly to the contracting buyers at the prices agreed upon in advance through their association is not within the purview of the Fish Marketing Act or the Capper-Volstead Act?

The Court: No. I think S-12 is not a correct statement of the law.

Mr. Kenny: We are saying in S-12 virtually that, are we not?

The Court: I don't think so. I think Government's 4 covers the Act with reading the Act, and S-12 will be declined.

S-13, it looks to me like that is confusing. The word "co-operative" I know you mention it several times, but I don't know how this can appropriately fit into the case.

Mr. Kenny: Well, there is in the minds of the jury, [67] undoubtedly, many of them who have had experiences with co-operatives, and as we know, there are many types of co-operative, and we are here seeking, just as we did with the word "conspiracy," to maintain that conspiracies don't necessarily mean a special type of connotation.

The Court: I read the Act to them and then I instruct them on what I conceive to be the application of that law here, and I don't mention the word "co-operative."

I think that it ought to be declined, and I will do so.

S-14, that is the same general idea on the labor.

Mr. Kenny: The first paragraph is a statement of the law of California. [68]

The Court: It is immaterial.

Mr. Kenny: That they have no title and must dispose of them.

The Court: It is immaterial. The second one is the same thing.

The third paragraph, fourth paragraph and fifth paragraph are matters relating to Section 6 of the Clayton Act and I think are covered, so S-14——

Mr. Kenny: There, again, as to the third and fourth paragraphs——

The Court: Third, fourth and fifth paragraphs.

Mr. Kenny: Yes, they serve to give our theory of how the jury can apply the Clayton Act which you were about to read to the jury for the benefit of the defendants. If government's 5 is given we would like to have our theory.

The Court: You can't do like Judge Lindsey used to do, just take everybody's instructions and give them all. I have to decide what the law is. I think theirs more nearly correctly states the law. S-14 is declined.

S-15 is given as modified.

S-16 goes into the reasons for the rule and is of the same nature as one of the other instructions, it is in the nature of argument and it will be declined, as is also S-17.

Mr. Margolis: Can we have just a moment, your Honor?

The Court: Yes. And 18, 16, 17 are declined. 18 I think is confusing and doesn't have any place in the case.

Mr. Kenny: Well, your Honor, there has been, if you recall, Exhibits 224 and 225 introduced by the government, the Santa Monica agreements, which were closed shop agreements, and the jury we believe should be told that because that is a turning point in the law suit in the Northern District that this contract and the proposed conspiracy is one for an open shop agreement.

The Court: I think it is immaterial, and that will be declined.

Mr. Margolis: Does that finish our proposals?

The Court: That finishes your originals and your supplemental theories.

Mr. Rubin: First supplemental.

The Court: And the second supplemental, except for those that I have laid aside. I will take those up now.

Mr. Margolis: Your Honor has laid aside S-2 and 9?

The Court: I have laid aside No. 9, S-2 and S-9. They all relate to picketing.

Mr. Kenny: Was S-8 laid over, do you recall? My notes may be wrong.

The Court: No, that is not correct. That was the newsboys' thing. That was declined. Wait a minute. 8 was laid over. Your No. 9, your S-2 and S-9 they all relate to the general subject-matter of picketing, strikes, boycotts, [70] and so forth. I don't find anything in the government's instruction which I believe meets the situation which ought to be covered in these instructions to the jury, although I have repeatedly stated them from time to

time throughout the trial that the defendants here are not charged with striking or picketing; that that is merely to be considered by them as evidence as to whether there was or wasn't the alleged conspiracy. In other words, you do not charge them with the actual restraint; you charge them with conspiring to restrain trade.

* * *

The Court: In other words, I don't think the jury ought to go out thinking they had a strike down there and tied up fishing, so we are going to convict them.

Mr. Rubin: I agree with your Honor's statement. It is material under our instructions with respect to the right to do certain things under the Fish Marketing Act, also. We probably will get to that when we consider our instructions. I think your Honor's statement is correct that they are not being charged with these specific acts, and I think the jury has been so advised.

Mr. Kenny: You don't contend that they couldn't picket or boycott to obtain an agreement under the Fish Marketing Act, do you? [71]

Mr. Rubin: We certainly do.

Mr. Dixon: Very definitely. If they are a fishermen's co-op they certainly can't force a contract on somebody which is a contract which fixes the prices that they agree upon.

Mr. Margolis: Did they say "we will only sell our commodities at a certain price"?

Mr. Kenny: Couldn't they advertise their dispute just as the man out on Sixth Street with the shoes?

Mr. Dixon: Here you come to the dilemma of the defendants: You want to be a labor union and a co-op at the same time. And the action which you took or which was, rather, taken the nature of the picketing and boycotting and everything else, was taken as a labor union. Of course, I don't think it makes any difference whether it is taken as a labor union or anything else, if it is part of a plan to force a contract on someone which wouldn't be a legal contract.

Mr. Kenny: Whether you are a labor union or a guy with a pair of shoes that doesn't fit, whether you are a Negro group that would like to be employed, or whether you are a dairy farmer, it is no offense against the Sherman Act to picket or boycott, and probably not an offense against any State law.

Mr. Rubin: To picket or boycott isolatedly.

The Court: Per se. [72]

Mr. Dixon: We don't deny that.

Mr. Rubin: But here there are other factors besides picketing and boycotting.

Mr. Margolis: If the objective of the picketing and boycotting is illegal, then of course under this complaint the picketing and boycotting is admissible to prove participation in illegal activities. But if the objective is legal then the picketing and boycotting certainly aren't illegal.

Mr. Rubin: You assume that the objective is legal because of the Act.

Mr. Margolis: No. no. All we want is an instruction to the effect that if what the defendants were trying to obtain was not a violation of the Sherman

Antitrust law then the picketing and boycotting do not make it a violation.

Mr. Rubin: The only reason, as I understand the argument of counsel, the reason that—their contention is, your Honor please, their position is that the contract as not illegal because of the Marketing Act, that is an exemption to the Sherman Act.

Now, that isn't legal per se. If it is legal at all it is legal because it is covered by the Act. Now, then the question is whether or not the Act makes that legal because it is simply an isolated contract, or whether that exemption is not taken away from it because you endeavored to enforce the contract. You are assuming an exemption—— [73]

The Court: Let me see if I can say something. I started to bring it out.

“Evidence has been admitted in the case of picketing and boycotting. These acts, in and of themselves, are not contrary to or in violation of the Sherman Act under which this proceeding is brought. They are to be considered by you as evidence in your determination as to whether the defendants did or did not conspire as alleged in the indictment.”

Now, that seems to me to be the law.

Mr. Margolis: I wonder if in instruction No. 9 you can say in that last sentence there—perhaps a little rephrasing of the last sentence, in other words, “You are not concerned with the means used by the defendants, but you are only concerned with whether the agreement is an unreasonable restraint of trade.”

Mr. Rubin: That is not the charge, and it doesn't fit in with the possible defense of compliance with the Marketing Act.

The Court: I think what I have stated there at least covers my notion of what the law is and should be given to the jury as a clarification to them of a lot of the evidence that has gone in, so that they will not be prejudiced in their determination of the question that they have to answer by the acts and conduct of the defendants in the picketing. [74]

Mr. Dixon: On that phase of it, I think your Honor understands that this is an affirmative defense.

The Court: I understand.

Mr. Dixon: It is set forth in our instruction No. 4, which we feel is clearly supported by the language, whether it is dictum or otherwise is immaterial, because of the reason it makes sense, to us at least, and in our view correctly states the proposition frequently referred to in some—well, in the Hinton case to the effect that as a business association they cannot force or do those acts which other people in similar circumstances cannot do. That the Fishermen's Marketing Act, so-called, does not give them any more right than the right to organize together for the purpose of selling their product, as is stated in the Act. That when they go beyond that, then they come within the purview of the Sherman Act and are subject to it, and that is what our instruction No. 4 is intended to convey, that proposition of law.

Mr. Margolis: Suppose they will say, "We will withhold our product off the market until we get a certain price," that is exactly the same sort of a coercive tactic as is used by labor when they say, "We will withhold our labor until we get a certain wage."

Mr. Dixon: You are dealing now as a business organization and not a labor union. The difficulty with your position, [75] in my judgment—it is only my opinion, of course,—is that you don't recognize the distinction between the two classifications.

The Court: All right. Just a minute. Do you see any objection to the instruction I dictated?

Mr. Dixon: No.

The Court: Do you see any objection to the instruction I just dictated?

Mr. Kenny: I think as far as it goes.

Mr. Margolis: That's right.

The Court: I don't think it ought to go any further. If I do, why, then I will get into the realm of commenting on the evidence, which I don't want to do.

Mr. Kenny: This instruction S-2 is one that should be given, and that is the general instruction of what the right to picket is.

The Court: I think that is covered by my instruction, that there isn't anything in the law to prohibit their picketing.

Mr. Margolis: We would like to offer the two paragraphs of S-2 separately. We think at least the first paragraph ought to be given.

Mr. Kenny: Because it is the only way that the issue between the government and ourselves will be resolved by the court. That is, the government is going to argue, obviously, [76] from what they have said here, that labor unions are the only people who could picket, and——

Mr. Dixon: And that only if there is a labor dispute.

Mr. Kenny: That is what the government is going to argue, your Honor, and it is important that the government be set straight. That is not the law. That is part of the free speech that has been guaranteed and has been spelled out in *Swing v. A. F. of L.*, *Senn v. Tile Layers*, in our own California cases.

Mr. Rubin: All labor cases, every one of them, and the theory of them is that there is no conspiracy among the picketing group to picket.

The Court: I think basically anybody can picket if they want to, because the only reason that labor is given the right to picket is because they have the right to free speech.

Mr. Kenny: Correct.

Mr. Rubin: As an individual. That is where the cases go off, if your Honor please. That is, it is mere coincidence that they happen to be in one particular place at the same time.

The Court: I don't think so. They might have a perfectly legitimate objective.

Mr. Kenny: Your Honor's last statement is the one that we agree with, and it is in direct conflict with what Mr. Rubin said. We are going to

be in this position, unless the [77] first paragraph of S-2, or something like that is read: I will be arguing to the jury about the man picketing out there on Sixth Street and he will be arguing that only in a labor dispute can you picket.

As I see the first paragraph of S-2 it expresses exactly what the court has just stated to be the law.

Mr. Rubin: We will accept the court's instruction.

The Court: "Evidence has been admitted in the case of picketing and boycotting. These acts in and of themselves are not contrary to or in violation of the Sherman Act under which this proceeding is brought. They are to be considered by you as evidence in your determination as to whether the defendants did or did not conspire as alleged in the indictment."

Now, let me see. "* * * of any law."

Mr. Kenny: Yes, I think that would be better than the "Sherman Act."

Mr. Margolis: I wonder if you would say, instead of the word "conspire," "enter into an agreement"?

The Court: No. "* * * did or did not combine or conspire * * *." I want to stick to the charge in the indictment.

Mr. Margolis: Will your Honor consider the first paragraph of S-2?

The Court: This covers it. "* * * in violation of any law."

Mr. Margolis: I would also like to direct your attention to S-9. I think, certainly, the last sentence

—perhaps if you say, “If you find that the combination or conspiracy, any alleged combination or conspiracy entered into by the fishermen,” and then the rest of it.

The Court: I see your point. Wait until I get this other one.

This sentence would be added, “If you find that the defendants did not so combine or conspire then you should disregard such evidence of picketing and boycotting for any purpose.”

Mr. Kenny: That is better.

Mr. Rubin: That brings us again to the question of No. 4. Our thesis is this: that ordinarily combinations of businessmen to fix prices are illegal under the Socony case. The defendants say they are given the right to do that under the terms of the Fishery Marketing Act, which is, in effect, an exemption; and we come back and say that while they may have the right to make contracts under that Act, they do not have the right to force those contracts by these coercive tactics upon other people. So that actually in determining whether or not they have the right to do what they did do, under the Act, whether the Act is a defense, the jury must consider whether these coercive tactics were used. The last sentence would take away from the jury that evidence. [79]

The Court: I don't think so.

Mr. Dixon: Will you read it again, your Honor?

The Court: You have to prove your conspiracy and combination.

Mr. Rubin: That's right.

The Court: The evidence of the picketing and boycotting as admitted for what purpose? To prove that they did agree and conspire.

Mr. Rubin: And for the purpose of showing—the second part of the charging paragraph: and to prevent non-dealers from obtaining fish.

Mr. Margolis: That there as an agreement to do that.

Mr. Rubin: That is part of the conspiracy, that is correct. Now, what the defendants are endeavoring to do is to accomplish the same thing as in their S-2, and that is if the agreement under the Act is legal then the question of picketing is immaterial. But our position is that you cannot determine whether the defense is available under the Act without determining whether or not as part of the conspiracy they used these coercive tactics, because the Act doesn't permit them to use these coercive tactics under our theory, so that evidence is important from that respect.

The Court: Let me read it again.

“Evidence has been admitted in the case of picketing and boycotting. These acts in and of themselves are not contrary [80] to or in violation of any law.”

Mr. Rubin: We agree.

The Court: “They are to be considered by you as evidence in your determination as to whether the defendants did or did not combine or conspire as alleged in the indictment.”

Mr. Rubin: That's right. It doesn't say solely for that purpose.

Our argument will be this: The defendants are going to say if the contract is legal under the Act then it doesn't make any difference what they did to get the contract across, or in any event it doesn't make any difference whether they picketed to submit that legal contract. Our position is there is nothing in the Act under which they are claiming exemption, mind you, which must be strictly construed, there is nothing in that Act which says that you can get that contract through picketing and boycotting methods.

They are endeavoring to obtain the exemption by the use of extra—not extra-legal but extra acts apart from the Fisheries Marketing Act itself.

The Court: I don't know that picketing is a coercive act, nor is boycotting.

Mr. Rubin: In and of itself. But we submit that the jury has the right to determine whether or not these things were done for the purpose or forcing this contract on the dealers, under the second portion of the charging paragraph, [81] and they have a right to determine that. Your Honor isn't going to comment on the evidence, but that was the purpose of it. As a matter of fact, Mr. Kibre testified that the purpose of the picketing and boycotting was to get the dealers to sign the contracts. If that is so the jury has the right to determine whether or not that is so. Then we submit they do not have the right to do that under the Fisheries Marketing Act. That is the reason we object to the last sentence.

Mr. Kenny: The simple answer is that the Fisheries Marketing Act didn't restate the Bill of Rights and the Constitution of the United States.

Mr. Dixon: Of course not.

Mr. Kenny: And the rights to advertise a dispute, coercive though they may be, are guaranteed as a matter of freedom of speech, and that is what the court is saying in his instructions.

Mr. Rubin: But not for the purpose of consummating an illegal act.

Mr. Margolis: If the agreement is illegal——

Mr. Rubin: What counsel assumes is that any agreement among these fishermen is legal per se. The only reason that the Fisheries Marketing Act comes into being is because it is an exemption, it is an exception to the Act, and therefore must be strictly construed. It is a defense to the Act. And for them to obtain that defense, which they didn't have [82] before, they must conform specifically to the terms of the Act and not go beyond the Act. That is the only thing that makes this contract legal. Otherwise it would be simply a straight price-fixing contract. The only thing that makes it legal from their viewpoint is there is an Act that says they can do it.

If that is so, they must stay within the terms of the Act, and these coercive tactics take them out of the exemption, and we submit the evidence is material for that purpose.

* * *

Mr. Dixon: I mean my point is if they are a cop, and that is a question of fact, of course, and it

is defensive material, whether they are this, that or something else is for the jury to determine, but if they are then we say that the law applicable to co-op Fishery Marketing association is that they may not do the things as we have outlined them in instruction No. 4. And if your instruction that I heard you give is intended to exclude that, then I would say certainly we would feel that it is not only not the law, but poor law and was given to business organizations rights which could properly be exercised for legitimate purposes of a labor union.

The Court: The mere fact that the defendants might picket or boycott does not take them out of Fishermen's Co-operative Act in my judgment.

Mr. Rubin: Except if its purpose is to enforce a contract on third persons. The Act doesn't permit them to do that. All the Act says is they can make such contracts. It doesn't say they can ram them down the throats of individuals.

Mr. Dixon: Nor to monopolize the markets, for example. They are not charged with that here, but that equally holds true.

Mr. Rubin: All the Act permits them to do, if your Honor please, is to permit them to get together and act as an association, just as a cooperation would, that is all the Capper-Volstead Act was for.

Mr. Margolis: Can they get into negotiations and say, "Unless you pay 20 cents a pound for fish you are not going to get any fish"?

Mr. Rubin: That isn't the purport of this instruction.

Mr. Margolis: When you talk about coercive tactics, that is what they are doing.

Mr. Rubin: No. they are not withholding their fish from the market. They are picketing and boycotting for the purpose of compelling the dealers to sign that contract, and that is even your avowal.

Mr. Margolis: They negotiate for that purpose. They [84] say, "We will sell you fish at a certain price for that purpose."

Mr. Rubin: "And if you don't take our contract you don't get any fish." And we submit the Marketing Act doesn't permit that.

Mr. Kenny: I can summarize it in 10 words. What Mr. Rubin contends is the Constitution does not apply to a cooperative; it doesn't apply to an individual, it does apply to a labor union, or other persons who might act collectively, but it doesn't apply to a cooperative, that is what he is saying.

Mr. Rubin: It doesn't apply to a co-operative for the purpose of accomplishing that which the Act specifically gives them the right to do under certain limits.

Mr. Kenny: Men can act collectively and express collectively through freedom of speech anything that does not offend some existing law.

You are saying that does not apply to this isolated group.

Mr. Dixon: There, again, it seems to me they are off on a tangent. To get back to a similar situation: the language of Judge McCulloch in the Hutchinson case, the theory set forth——

Mr. Rubin: You mean the Hinton case.

Mr. Dixon: Yes. That it failed to disclose that a fishermen's co-operative could do anything other than what a [85] normal business man could do, and that the purpose of the co-operative Act was to merely permit individual fishermen to join together to collectively fish, market, and do those things specified in the statute, period. And then the opinion goes on to say that it didn't give them rights beyond that, and I submit that it doesn't. There is nothing in the law to indicate that they can do that.

Now, the indictment here charges that they conspired to fix the prices and to prevent the dealers from—who would not sign the agreement, Exhibit A—from getting it, which we submit——

The Court: I don't think that this is contrary to your conception of the law.

Mr. Dixon: It may not be.

The Court: As I view the law, they can be a Fishermen's Co-operative Marketing Association and still violate the Antitrust law. But the mere fact that they might picket or boycott doesn't make them violate the Antitrust law.

Mr. Rubin: In and of itself. The other sentence goes on further. In and of itself. As I understand your Honor's instruction, they are not being charged with the crime of picketing and boycotting because that isn't a crime. We wholeheartedly agree. Your Honor is limiting the consideration of that evidence solely to that question. We submit that that evidence is material in determining whether or not these people have done things beyond that which

the Fisheries Marketing Act permits them to do, and it should be considered for that purpose. [87]

Mr. Kenny: I suggest that that may be considered when we get to No. 4. We have many objections there.

* * *

Mr. Margolis: There is no combination or conspiracy charged in the indictment.

The Court: If you haven't a conspiracy here as you charge in the indictment then you haven't anything.

Mr. Margolis: It wouldn't make any difference if they went out and killed somebody, as far as this indictment is concerned.

Mr. Rubin: But you see, your Honor please, they are arguing in a circle. I have argued in circles before and probably will do so many times again, but their position is that this is a legal means to accomplish a legal objective. Now we submit that even though picketing be a legal means, nevertheless when it is combined with a price-fixing arrangement that that does not fall within the purview of the marketing act, but becomes an illegal means of accomplishing an illegal object.

* * *

The Court: I will read the whole thing. It is short.

"Evidence has been admitted in the case of picketing and boycotting. These acts in and of themselves are not contrary to or in violation of any law. They are to be considered by as evidence in your determination as to whether

the defendants did or did not combine or conspire as alleged in the indictment. If you find that the defendants did not so combine or conspire, then you should disregard this evidence of picketing and boycotting for any purpose."

Mr. Margolis: You can say you can acquit.

Mr. Dixon: No.

Mr. Margolis: That if they did not combine or conspire, then there should be an acquittal.

Mr. Rubin: I think that is a better instruction. There is nothing wrong with that instruction.

Mr. Margolis: The point is, we want that in there also to emphasize the fact that the picketing should be disregarded.

Mr. Rubin: But the picketing shouldn't be disregarded in order to determine whether there has been a conspiracy.

The Court: Then you should acquit them, because if they did not combine and conspire then there is no crime committed.

Mr. Margolis: Then of course they disregard the picketing.

Mr. Dixon: We don't want the last sentence.

The Court: The last sentence is changed.

Mr. Margolis: How is it going to read?

The Court: "If you find that the defendants did not so combine or conspire, then you should acquit the defendants."

* * *

Mr. Margolis: I didn't ask for that change to be made. I said we could go that far.

The Court: We have gone that far.

Mr. Margolis: But we are here asking your Honor to do something short of that, because that is what will make that instruction clear.

Mr. Kenny: It really is contrary, as it is now stated, with the oral instruction you gave the jury at page 97 in the transcript.

Mr. Rubin: That is the same thing as the judge paraphrased in the first portion of it.

Mr. Margolis: May I ask this, your Honor, if there is no combination——

Mr. Kenny: Let the judge read page 97 of the transcript.

The Court: "I do not think the Government is trying [90] to convict the defendants here of picketing. But there is no use of discussing a proposition such as this before the jury because I might make some remark on the law that might prejudice one side or the other. Let it be sufficient to say at this time that I now overrule the objections and will admit the two photographs in evidence as Exhibits 1 and 2."

Mr. Margolis: May I say this, your Honor, if there is no combination or conspiracy proved, and they must acquit, then doesn't it follow that it is correct to say that they must disregard the picketing?

Mr. Dixon: That is the end of the case.

Mr. Kenny: I would also like your Honor to read your colloquy with counsel at page 767 of the transcript, which is illuminating. It was largely encouraged by that which caused us to draw up the instruction.

Mr. Margolis: I just can't understand about that. If there is no proof of a combination or conspiracy then for whatever purpose it is in the case they must disregard it.

The Court: They must acquit them.

Mr. Dixon: They must acquit them, period.

Mr. Margolis: But isn't that also equally true that they should disregard the picketing?

Mr. Rubin: Then they must disregard all the evidence [91] for that matter.

Mr. Dixon: That is a very fair instruction, your Honor.

The Court: From the evidence so far in the case, I do not see why—I was looking again at that instruction this morning—it would seem to me that I would have to instruct the jury, in the event the case gets that far, that the admitting of evidence concerning strikes and pickets are only admissible as evidence in your determination as to whether the defendants did or did not combine or conspire as alleged in the indictment. In other words, the defendants are not being tried for picketing or striking.

Mr. Kenny: Now the word “only” is not in this instruction as we have it, and that is a very important word.

Mr. Rubin: The purpose of the picketing is to substantiate the charges.

The Court: That matter is settled, gentlemen. I will give the instruction as I read it to you.

That completes those. Now let us take up Government's Exhibit No. 1.

Mr. Margolis: No. 1 in effect says you must disregard the Clayton Act and you must disregard the Fishermen's Marketing Act.

The Court: I follow that immediately by the instruction—well, there is one instruction about price-fixing, then the Fisheries Marketing Act and then would be an instruction. [92]

Mr. Margolis: But you say here it constitutes a violation of law.

Mr. Kenny: What line?

Mr. Margolis: Line 29. If you find all of these things it constitutes a violation of law, and bang out goes the Fishermen's Marketing Act and out goes the Clayton Act. They just can't consider it.

Mr. Kenny: In other words, it does not take into consideration any of the exemptions.

Mr. Dixon: The exemptions are covered under the other instructions and the affirmative defenses.

Mr. Margolis: Without considering the instructions, you say it constitutes a violation of law?

Mr. Dixon: That is right, under the theory of the indictment this states the law. Now you have set up affirmative defenses and I submit again that is an affirmative defense.

Mr. Margolis: Then you should say it constitutes a violation of law and in the absence of exemption under the Clayton Act or under the Fishermen's Marketing Act.

Mr. Dixon: No. All that is required then is to show, as we view the law, under what circumstances you would not be guilty as contended by the defendants. Frankly if I may finish, Mr. Margolis, we don't think on the evidence that has been adduced

in this case that there is the necessity to charge [93] under the cooperative act or the labor union provision, because we don't think the evidence adduced brings us under either one of them, but in the interests of making certain here that that issue is presented to the jury, since you have indicated that that is your defense, we have drawn and submitted to the Court the instructions on both of those possibilities.

* * *

Mr. Margolis: Why give instructions on the Fishermen's Marketing Act and why give instructions on the Clayton Act when this knocks it out?

The Court: But I give them an instruction that they cannot single out any particular instruction but must take them all into consideration.

Mr. Dixon: That is our contention. There are later instructions to cover your defenses but one is distinctly our contention.

Mr. Kenny: I think the Court intends to qualify that bald statement.

Mr. Dixon: It is like the association of any [94] other group of businessmen that might get together and do those things.

The Court: I think that that can be left as it is and the matter would be clarified by inserting at line 23 after the words "conspiracy or combination," to make it read, "then I charge you as a matter of law that a conspiracy or combination as alleged in the indictment of any such fisherman for the purpose of fixing, establishing and maintaining the price" constitutes a violation of the law.

Mr. Dixon: We have no objection to that.

The Court: In other words, say here, if they are independent businessmen then they are not a labor union and they are not a cooperative, and they have engaged——

Mr. Kenny: Wouldn't it be helpful, your Honor, if you put "are solely independent businessmen" on line 19?

The Court: They have not alleged that. I would just add after "conspiracy or combination" the words "as alleged in the indictment."

Mr. Kenny: Wouldn't it be helpful, your Honor, if after the words "independent businessmen" you added "and not a cooperative or workers?"

The Court: No, I think not. Then I would have to go to work on your other instructions and say if they are cooperators and not independent businessmen or are independent businessmen, and so forth. I think this straightens it out meets [95] your objection. In other words, if they are independent businessmen, if they did the things as alleged in the indictment, then it is a violation of the law.

Mr. Margolis: But independent businessmen can combine under the marketing act.

The Court: Not as alleged in the indictment.

Mr. Dixon: That is correct.

Mr. Rubin: The fact that they can combine is set forth in a subsequent instruction.

Mr. Dixon: And the conditions under which they may combine.

The Court: The objections to Government's Instruction No. 1 are overruled.

Mr. Dixon: Then the words are added?

The Court: On line 23, after the word "combination" I have added the words "as alleged in the indictment."

Mr. Margolis: It seems to me that there should be the same sort of modification here that there was with respect to the instruction on picketing. You said that picketing standing alone in that instruction—I think it should read, if you find these facts standing alone.

The Court: No, I do not think so. I think in view of the others that this fairly presents the matter.

Mr. Margolis: May the record show we object to this instruction upon each and every one of [96] the grounds stated in our discussion of the objection without repeating it?

The Court: Yes.

Now the next is Government's Instruction No. 2. I think that is correct. I read the Socony-Vacuum case again.

Mr. Margolis: To begin with, your Honor, we object to the whole instruction.

Mr. Kenny: I think "floor" should go out because there is no floor. There was no support buying here.

The Court: I think there isn't any evidence of a floor.

Mr. Dixon: Oh, yes, there is, your Honor. The minimum prices. This is a floor case. The agree-

ment was that they should be the minimum prices.

Mr. Kenny: I think the floor has an entirely different meaning in the law and in the concept of the jury. "Floor" means——

Mr. Dixon: Below which they may not go. It is generally referred to, your Honor, as a floor in price-fixing cases. That is why we used the term.

Mr. Kenny: We would rather have "floor" than "minimum" because the floor is obviously not there. There are enough men with business experience on that jury to know what a floor is.

Mr. Margolis: We want to object to this also on the ground that it is an incorrect statement of the law, that the Socony-Vacuum Oil case, on which it is based, applies only to situations where [97] there is a sort of combination which has a tendency to affect consumer prices, and also that it applies only to combinations in which there is something more than a mere agreement with regard to prices, but there are artificial means, such as buying up and keeping products off the market, which artificially raises and maintains the price to the consumer and does not apply to a situation where competition remains in the market by virtue of competition with other products and the price to the consumer is not necessarily affected.

We also want to object to this instruction on the same ground as we objected to Instruction No. 1, that it practically throws out the defense of the Fishermen's Marketing Act and of the Clayton Act, Section 6 of the Clayton Act which we have referred to. And also as to this particular objec-

tion, it should at least state that if you find these facts alone and no other facts, and that leaving that out makes the instruction incorrect upon the second ground of objection.

Mr. Kenny: Furthermore, I have one other point, and that is, that the words "market prices" as used in line 16 means, in the Socony-Vacuum case, maximum prices to consumers and not market prices to those who buy for resale, and market prices as it stands here undefined simply cannot be understood by the jury. [98]

* * *

Mr. Kenny: If we aren't allowed to have any instructions on the rule of reason, they certainly shouldn't have any instructions against the rule of reason. What is sauce for the Government is the goose for us evidently.

Mr. Dixon: It is the language taken at page 222 and 223 of the case itself. I don't know what better authority we could give than that.

The Court: On Instruction No. 2, on line 15, I will change "which serves" to read "which may serve;" and also "which prevents" to read "which may prevent." So that latter part will read "a floor which may serve the function of increasing the stability and firmness of market prices and which may prevent the determination of those prices by free competition alone."

Mr. Kenny: This also, as the other instruction, does not give the jury any guidance as to what market we are talking about.

Mr. Dixon: It is the only market charged in the indictment. [99]

The Court: Very well. The objections to Instruction No. 2 are overruled with the changes noted, the addition of those two words.

Now we come down to Instruction No. 4.

Mr. Kenny: No. 3.

The Court: No. 4. No. 3 comes in later. I will read this portion of the text of the act first and then follow with this.

Mr. Kenny: My first objection would be at line 8, "at which the association itself or as sales agent for its members." Now that clearly does not take into consideration the Stark County case and numerous other cases of bargaining cooperatives, where it is merely a cooperative agency.

The Court: It is a sales agency. That is what they are doing.

Mr. Kenny: They are not selling. They don't take title.

The Court: They are a sales agent for its members. I can strike out "sells the fish," or is it your theory that they must take title to the fish?

Mr. Dixon: They are selling the fish caught by the members, your Honor. They are selling it directly or as sales agents. I don't think the question of title enters into it there at all.

The Court: This must be confusing then—"enter into a contract with a buyer of fish which [100] provides for and then fixes the price at which the association itself or as sales agent for its members sells the fish * * *"

Mr. Kenny: Your Honor wipes out every bargaining right then.

The Court: I do not think so.

Mr. Margolis: But they don't have to sell the fish. They can bargain for the fish, the price at which the fish can be sold.

The Court: What is the difference?

Mr. Margolis: They are going to make a difference on it.

Mr. Kenny: That is what the Government is going to make a difference on. In other words, there are dozens, in every perishable commodity there are dozens of bargaining cooperatives. We have given you numerous citations to that effect. And it is a common practice, particularly in the perishable commodity field. At which the association itself sells the fish or negotiates for prices at which the members sell and deliver the fish.

The Court: Suppose at line 8, "at which the association itself or as sales agent for its members," suppose we strike out and say "which provides for and fixes the prices at which the fish caught by the members of the association is sold to a buyer."

Mr. Kenny: Good.

Mr. Rubin: I don't think that is the law, [101] your Honor please. I don't think that a cooperative has the power to do that. A cooperative either functions as a business organization or as a sales agent.

The Court: I leave "sales agent" in there.

Mr. Rubin: Their sole function in this particular case is that they are simply negotiating the price

at which its members will sell to the dealers, and that is all the evidence here shows.

Mr. Kenny: That is right.

Mr. Rubin: We submit that that isn't the thing that the Fisheries Marketing Act contemplates at all. That isn't marketing.

Mr. Kenny: How does the Government overcome the definition of marketing, because in Dr. Schneider's testimony——

Mr. Rubin: Dr. Schneider's testimony isn't in evidence, in the first place; and in the second place this little pamphlet that you submitted yourself to the Court indicates that an organization of some sort is necessary, and it distinguishes between the bargaining agent type of labor union organization, with respect to canneries and with respect to fresh market dealers.

Mr. Kenny: I have also submitted Stockdyke's book in which he refers to bargaining cooperatives. I have told the Court, and he knows, of three dairy cooperatives right here in this county that operate that way, one in San Diego, one in asparagus, and another one. [102]

Mr. Dixon: Rather than sales agent?

Mr. Rubin: I don't know how they function in detail, but we do know how this organization functions in detail and we don't think those come into this at all. As a matter of fact, they may be illegal, as far as I know.

* * *

Mr. Kenny: Will you yield for two minutes?

I think that this is tremendously important that

we come to grips with this one because this is one where the Government is either very right or a lot of people are very wrong. And, as I say, it is in the Farm Security booklet. Judge Holbrook's book refers to this type of a bargaining cooperative, and it is referred to in Stockdyke's book and it is referred to in the book on Economics of Cooperatives, and also the definition is given in Exhibit GG-1 for identification. I haven't it before me, but it is very clear. And these books weren't written for the case, they were published in 1937 and 1936. It is probably the most critical legal question that we have been confronted with here.

The Court: Beginning on line 5, "when formed for such purposes, an association may," then quoting the law, "have marketing agencies in common and such associations and its members may [103] make the necessary contracts and agreements to effect the purposes of marketing." Have you the law before you there?

Mr. Dixon: Yes, your Honor.

Mr. Rubin: Of course there again we are diametrically opposed in argument to the jury as to what constitutes marketing.

The Court: They are going to have to decide that, I think.

Mr. Rubin: Is that a question of fact, how marketing is construed?

The Court: Maybe not.

Mr. Dixon: As I indicated before, I gave considerable extended thought and consideration to this instruction.

Mr. Kenny: Your Honor, if you will recall in the Stockdyke book he mentions financing cooperatives and he says, the bargaining cooperative doesn't need any financing because it merely bargains and the members deliver directly.

The Court: Yes. He talked about not having an office.

Mr. Rubin: But the word "bargaining" is interpreted by the author of that book. The term "bargaining" can refer to a lot of situations. They may be the principals and the beneficiaries of that bargaining and not the parties of the bargaining.

* * *

Mr. Kenny: Your Honor, in this regard we were to consider our proposed Instructions S-8 and S-12, which does have the matter of the bargaining agent or sales representative. There is language in our S-12 which might be helpful.

* * *

The Court: Let me see if this would resolve the differences: "When formed for such purposes,"—there isn't any evidence here that an organization was collectively catching their fish or preparing it or processing it or handling it? [105]

Mr. Kenny: That is right.

The Court: There is only the marketing.

Mr. Margolis: One of the things, when you come right down to it there, I think it should read "when formed for any such purpose" instead of "for such purposes."

Mr. Kenny: Any of such purposes?

Mr. Margolis: Because obviously it doesn't require them to collectively catch, collectively produce, collectively prepare for market, collectively process to collectively handle.

The Court: The statute uses it in the conjunctive.

Mr. Margolis: Yes, your Honor, but it is a permissive statute. It says they may do all of these things. If they do something less than the statute permits, that is all right. Otherwise then what it means is if they caught and marketed but did not process the act would not apply.

The Court: No. Leave that as it is and say, "When formed for such purposes, such an association may, on behalf of its members, maintain marketing agents for the products of its members and may make the necessary contracts and agreements to effect such marketing."

Mr. Kenny: I am behind you here.

The Court: The language is in the act. "Such as, may have marketing agencies in common and such associations and their members may [107] make the necessary contracts and agreements to effect such purposes."

Mr. Kenny: We are still behind you.

The Court: I am just reading the law here.

Mr. Margolis: I wonder if we could have read back the language which your Honor suggested.

The Court: I can give it to you. "When formed for such purposes, such an association may, on behalf of its members, maintain marketing agencies for the products of its members and may make the

necessary contracts and agreements to effect the purposes of the association."

Mr. Kenny: That leaves to the jury the decision of whether there is a cooperative marketing agency, which is a question of fact.

Mr. Rubin: The word "marketing agency". I don't think would be helpful to the jury, in my humble opinion, if your Honor please, because they are going to argue that this is just a marketing agency and we are going to have to say that they must do more than fix the price at which their members will individually sell to the dealers. That will be the argument made before the jury. [107]

* * *

The Court: Do you see any objection to that? That is taking the language of the statute.

Mr. Dixon: The only objection I see to it, your Honor, and that is the reason we made this instruction in the form we did, was that the jury may not know what the instruction encompasses. They may be confused by it and may come back and ask for further instruction from the Court.

The Court: I do not see how this language that I have lifted from the act is any more confusing than the language that you have. I am inclined to doubt that to come within the provision of this act the association must take title.

Mr. Dixon: I don't think so. They can act as a sales agent, and that is precisely what they do. But they are selling something, because that is the purpose of the cooperative act, to enable them to pool together to sell their products, and that is why

we feel that if they don't sell anything, or act as a sales agent for any of their members in selling anything, that they are not a cooperative.

Mr. Kenny: You have got your hands full if that is the case. You have them all over western America. And there are long discussions in [108] all the books about the question of taking title.

Mr. Rubin: They can sell on behalf of the members; they don't have to take title.

The Court: Why not say, "The association itself or as sales agent for its members sells on behalf of its members the fish caught?"

Mr. Rubin: I think that is perfectly all right, and that is the law.

Mr. Kenny: Your Honor, that is the vice in this thing. They don't have to sell on behalf of the members. They merely fix the price at which the members do sell and deliver. That is the vice of the thing and the language of the statute—we have it here—but if the Government prevails they would have you put something in the statute that is not in it.

Mr. Rubin: The whole purpose of these cooperative statutes, if your Honor, please, is to give these people the combined power as though they were a separate entity to compete with large cooperative groups.

Mr. Margolis: They do it through bargaining. That is one of the most accurate statements you have made. We agree with you.

Mr. Rubin: We submit that the stockholders of a corporation don't sell the products; the corporation sells the products. [109]

Mr. Kenny: This is the onerous implication of the Government's position, and that is that they want them to be a much more integrated combination than the one that they are.

Mr. Rubin: That is right.

Mr. Kenny: I think that really flies against the philosophy of the antitrust law.

Mr. Rubin: That is something else again. You have to have some entity there that can be held responsible for these things. That is the purpose of this.

* * *

The Court: I think that this would be an accurate statement, "sells on behalf of its members the fish caught by the members." That is on line 8 after the word "sells."

Mr. Kenny: We have written all this other in. Is that out now?

The Court: I think that is better. The way it is here now "may on behalf of its members maintain marketing agencies for the products of its members and may make the necessary contracts and agreements to effect the purposes of the association." [110]

Mr. Kenny: Yes.

The Court: I am inclined to think that is a little more confusing than the last one.

Mr. Rubin: So it reads how now, your Honor?

Mr. Margolis: Referring to your language.

The Court: I am referring to my language.

Mr. Margolis: To be left in?

The Court: To be left out and the instruction given as it is.

Mr. Margolis: Do I understand by your Honor's instruction to mean that the intent of this instruction is to say to the jury that an association which collectively bargains for its members to set the price at which the members will sell their products does not come within the purview of the Fishermen's Marketing Act?

The Court: That is not what this says.

Mr. Margolis: That is the effect of it.

The Court: What I am saying is that the price at which the association itself or as sales agent for its members sells on behalf of the members the fish caught by the members of the association.

Mr. Margolis: But, your Honor, the effect of that then—I think we are entitled to know whether that is your Honor's intent—the effect of that is to say to the jury that a bargaining agency fixing the prices at which members sell their product [111] cannot be covered by the Fishermen's Marketing Act. Maybe that is what your honor has in mind.

Mr. Rubin: I think your Honor's statement is an exact statement of the law.

The Court: I think under the law here as it is written, and as I read it, that this instruction accurately describes it.

Mr. Margolis: May I ask your Honor this question—I would like to understand that one thing because we are going to have to be guided in our argument by these instructions—it is our contention that a collectively bargaining agency that simply collectively bargains for prices may come under the act if it conforms to the other provisions of the

act, may come under the act. Now I think we ought to know whether your Honor's instruction is intended to preclude that.

The Court: I think on the position you have just stated that that is a matter of argument and I doubt if I can or should formulate an instruction to the jury that goes beyond this. Of course you have to keep in mind that the rest of this instruction here elaborates upon this first sentence.

Mr. Margolis: If your Honor please, if it is a matter for argument——

The Court: Now if I instruct the jury in this, that it is a sales agent, that it may be an association which itself or as sales agent sells on behalf of [112] its members the fish caught by the members of the association, then the jury has to decide whether or not they did or did not sell on behalf of its members from the evidence in this case.

Mr. Margolis: But the point is, your Honor, does that mean that they must sell, actually sell, the fish?

The Court: You mean, do they have to take each fish and sell it?

* * *

Mr. Margolis: That is what the Government is going to argue that your language means.

The Court: That they must take the title to the fish?

Mr. Rubin: No.

Mr. Margolis: Or that they must actually say, "We are selling you a boatload of fish." But they cannot bargain to say, "For the fish that is sold you

for the next year or for the next six months you will pay a certain price." That you can't do.

The Court: I think your latter statement is not the law, that they cannot under the Fishermen's Marketing Act sit down and bargain that the price of fish for a year shall be such-and-such and so-and-so, or fix a formula for fixing it. I think that, as this instruction points out, they must be arrived at by free and voluntary negotiations so that the competitive element enters into it from time to time as the fish are sold. [113]

Mr. Kenny: Let me get this straight, your Honor. What they are bargaining for or selling is futures in fish. The fish has not been caught. It is just as the milk has not been produced from the cow, or the crop has not been harvested. I take it that your Honor is not saying that it would be a violation of the marketing act to sell in advance.

The Court: Of catching?

Mr. Kenny: Of catching.

The Court: I am not saying that.

Mr. Kenny: That is good.

Mr. Margolis: I wonder then, "sells the fish caught or to be caught," if that isn't better.

Mr. Kenny: That would help.

Mr. Margolis: At least that ought to be in there.

Mr. Kenny: Caught or to be caught. That would be a great help, your Honor.

* * *

The Court: All right. Caught or to be caught by the members.

Very well. Let's go on.

Mr. Kenny: Of course I like "free and voluntary" if it means as within the language of the Allen Bradley case and others. In other words, I take it your Honor is meaning by that instruction that they must not collusively rig up a deal [114] with the middleman because if they freely and voluntarily and openly negotiate I think perhaps——

Mr. Margolis: The trouble is that that would be construed as meaning if you have picketing then it ceases to be free and voluntary.

Mr. Rubin: That is correct. That is precisely our position there, that that is not permitted within the exception to the Sherman Act.

Mr. Dixon: Not as a cooperative.

Mr. Margolis: That gets down to whether that constitutional right extends to others, and the language if it is left in there will be used by the Government precisely for that purpose.

Mr. Kenny: If the language is meant to mean that they can't conspire vertically and enter into agreements that are collusive and not agreements that are obtained as the result of open bargaining, that is one thing. That is what I read into it.

The Court: Down on line 17 I think that I should strike out the word "coercive"—do not make your changes on that until I finish—"enter into such a contract by coercive practices and tactics which are not free and voluntary."

Mr. Margolis: There is a question of what that will mean to the jury. [115]

The Court: They have to decide that just as in all kinds of cases they have to decide whether the fellow is guilty or not guilty.

Mr. Margolis: I wonder if there couldn't be a sentence added there, that to use the words "free and voluntary" is in contradistinction of a collusive combination.

* * *

Mr. Rubin: We are talking about two different things now, counsel. One is an Allen Bradley case and the other is the means used.

Mr. Kenny: We read Allen Bradley into the language and you read *Lowe v Lawler* into it.

Mr. Rubin: I think the Allen Bradley matter is included also later on.

Mr. Margolis: The problem, as I see it, is that the way this thing will be left the Government will argue that what that instruction means is that if you get a contract as a result of picketing, that picketing is a coercive tactic, or that such a contract is not a free and voluntary contract.

The Court: I think the next one straightens it out: "Such a contract entered into between the defendant association and a buyer or buyers of fish under the latter circumstances would be one in which the price was fixed by one party to the contract and the price would therefore be an arbitrary, [117] artificial and non-competitive price."

Mr. Kenny: That is quite true, but the evidence shows that they were seeking an agreement of two parties.

The Court: The jury has to decide that.

Mr. Dixon: That is right.

The Court: The jury has to decide whether it

was fixed by one party. In other words, it is not free and voluntary if one party comes in and says, "Pay this or else."

Mr. Kenny: Or else no fish.

The Court: Or else anything.

Mr. Margolis: I am just wondering if we have to apply that to the cases to determine what your Honor means. Does that mean if a bargaining association of this kind presents a contract and says, "These are our demands, we won't deliver fish to you unless you pay us this price," and the dealer then says, "All right, in order to get fish I will enter into such a contract"——

The Court: That is what the charge is here.

Mr. Margolis: Taking those as the accepted facts——

Mr. Dixon: That is what the jury is to decide.

Mr. Margolis: Taking those as the accepted facts, would that be a free and voluntary contract?

The Court: The Government is charging here that it was a conspiracy to obtain just a contract in just such a fashion and that it is violation of the law. [117]

Mr. Margolis: I am talking now about what your Honor's instruction means.

The Court: I know, but my instruction is trying to at least be consistent.

Mr. Margolis: My only problem is that I am trying to find out—you see, free and voluntary can have so many different meanings. Free and voluntary can mean——

Mr. Dixon: That is for the jury to decide.

The Court: I think that is for the jury to decide.

Mr. Dixon: As I said, your Honor, we don't think the defendants have brought themselves even to a position, from an evidentiary point of view, where they would be legally entitled as a matter of law for this instruction, but since it is their defense, if the jury thinks it is a defense, I think they are entitled to have it at least submitted to the jury in the interests of the defense going to the jury, even though from a practical point of view, or from our point of view, there isn't any evidence at all to support the defense.

Mr. Margolis: I don't see how there can be a contract in which the price is fixed by one party. And a contract is an agreement. The whole thing to me just doesn't make sense.

The Court: Lots of contracts have been entered into that people have had set aside because they were not free and voluntary. [118]

* * *

Mr. Margolis: I wonder if it would be necessary at this time to restate our objections or may our agreement be considered as objections?

The Court: Yes. Surely. What I had intended to do in connection with the record in the case was to go instead of signing all of these instructions and indicating on each of them, to have this portion of the transcript become the part of the file and take the place of any written rulings of the judge on the instructions, and the instructions as read to

the jury and transcribed by the reporter to be in the instructions given rather than to sign "refused," and so forth.

Mr. Margolis: That is very good. [119]

The Court: In this way this gets in all of your argument.

Mr. Margolis: All of our argument is considered as made in objection form then?

The Court: That is right.

Mr. Kenny: And of course our proposed instructions will be part of the record, your Honor?

The Court: They will all be here.

Now I will read that first portion of your S-11 just before that and follow with Government's Instruction No. 4.

Now Government's Instruction No. 5, everybody agrees to that, so we will just pass on.

Mr. Kenny: I can't seem to lay my hands on it.

The Court: We will have a short recess.

(Short recess.)

The Court: We will now take up Government's Instruction No. 5.

Mr. Kenney: That is where we start parting company with the Government as this is generally used and understood, that is, beginning on line 7, the third sentence of the first paragraph.

Mr. Dixon: That is Justice Frankfurter's conclusion.

Mr. Kenny: The point is, it doesn't make any difference how the term is generally used.

The Court: I was thinking that the next [120] sentence explains it without that sentence.

Mr. Kenny: It certainly would be better.

The Court: I think that is sufficient here.

Mr. Dixon: I think, your Honor, that is probably correct.

Mr. Margolis: The word "independent producers" is from the Hinton case?

Mr. Dixon: No.

Mr. Margolis: It is inserted here.

Mr. Dixon: It is from Note 5. You will find the reference on page 976.

Mr. Margolis: But not the words "independent producers."

Mr. Dixon: Yes, I think it is in there.

Mr. Rubin: I think it is too.

Mr. Dixon: It is some time since I read it, but we can quickly find out.

Mr. Margolis: First of all, our feeling about the thing is that this instruction is completely unnecessary because the question, as we see it, is not whether Local 36 is a labor union but whether Local 36 is composed of persons who are selling their labor, and if so, labor not being a commodity, whether you call it a labor union as that term is used is immaterial.

Mr. Kenny: In other words, we are not pressing the Norris-LaGuardia Act in this case. [121]

Mr. Margolis: That is right. That was a Norris-LaGuardia Act case.

Mr. Kenny: Nor are we pressing Section 20 of the Clayton Act.

Mr. Margolis: We are pressing Section 6 and particularly that portion of Section 6 which talks about labor not being a commodity. The Hinton case was written with special reference to the Norris-LaGuardia Act in which it was absolutely necessary to determine whether or not the association was a labor union. That went to the very heart of the case. We are not claiming any exemption on that basis. We are relying on Section 6 of the Clayton Act, and this simply avoids that issue because the issue under Section 6 of the Clayton Act we are referring to is that labor is not a commodity.

The Court: I think that sentence beginning with the words "as that term is generally used" on line 7 down to line 10 ending with "to some employer," can and should probably come out.

Mr. Kenny: Well, now, the next sentence, it seems to me that that isn't the law, that is, there could be and are self-employed groups who are labor unions. Witness the *Hearst v NLRB* decision.

It seems to me the Government has made its point by getting in the second sentence where it says, "the fact that said defendant association may refer to, act as, or call itself a labor union does not in [122] and of itself make said association a labor union," but they are treading on ground that is not legally secure when they rule out self-employed persons from a labor union.

And, as I say, you have the newsboys case and you have the case of the Hard Rock Miners and others who are what they call leasers and to that

extent self-employed but are labor unions. I think that the Government is asking for something here that just isn't the law.

Mr. Dixon: Even those persons as indicated, those latter persons, stand in the relationship of an employee to some employer.

Mr. Kenny: No, the cases turn on the differences in bargaining power.

Mr. Rubin: No. The Milk Wagon Drivers case doesn't turn on that point. They call themselves employees in the contract. They said they were just technically independent contractors.

Mr. Margolis: What they call themselves doesn't make any difference.

Mr. Dixon: I am saying the Court took those facts into consideration in determining whether or not they are independent contractors or technically employees. They said in that case that the fact that they nominally owned their own trucks, and so forth, that they weren't considered as employees. They were considered as employees in that case, in the Milk Wagon Drivers case. [123]

The Hinton case expressly distinguishes those cases.

Mr. Margolis: But they were technically self-employed, but for the purpose of the Wagner Act, for example, for purposes of other acts, they are treated the same as people who are employees. The point is, you can be self-employed for one purpose and an employee for another purpose.

Mr. Kenny: Not only that, but you can be self-employed for one purpose and band yourselves together to act collectively.

Mr. Rubin: This whole issue is important only with respect to whether or not a labor dispute exists.

Mr. Dixon: That is right:

Mr. Margolis: As I said, we think this is an incorrect statement of the law.

Mr. Kenny: If we were urging here a Norris-LaGuardia Act defense, that would be another matter, but there have been no instructions from us on that.

Mr. Margolis: We are relying on Section 6 of the Clayton Act.

Mr. Dixon: Our position on Section 6 is that that in and of itself does not take collective organizations of labor, laborers, whatever you want to call them, horticultural workers, and so forth, outside the Sherman Act and that was the reason the cases indicated for the passage of the Fisheries [124] Marketing Act and the Agricultural and Horticultural Act.

Mr. Kenny: That wasn't the reason.

Mr. Rubin: This is sort of over-the-counter discussion but how can you consider Section 6 of the Clayton Act without considering the subsequent cases that construed that act, such as *Loewe v Lawler*, and so forth?

Mr. Margolis: *Loewe v Lawler* was before that.

Mr. Rubin: I mean these subsequent cases that followed the cases and the Clayton Act with respect to their exemptions, and so forth, which gave rise to the necessity of the Norris-LaGuardia Act. I don't see how you can take the act itself and stop

at that point, because if you are going to take that act then you also have to take the Supreme Court decisions that construe that act.

Mr. Margolis: The interpretation of the Clayton Act today is far different than it was in the early cases that were decided.

Mr. Rubin: Only because of the Norris-LaGuardia Act, which you are disavowing. I agree with you. I am a lot closer to your position than you think I am, but you did disavow that act.

Mr. Kenny: If the Government wants to extend the Norris-LaGuardia Act to us and say we have a possible defense under it and we have some possible instructions about labor disputes, and so forth, then maybe this sort of thing would be the subject [125] of discussion. But that isn't before us here.

The Court: If I strike out that sentence and change the next sentence, "An association of independent producers or of persons who are self-employed," and then change the "or" to say, "and who are engaged in business on and for their own account and profit, free from such controls as an employer ordinarily exercises over a person who is an employee, would not be a labor union."

Mr. Kenny: That would be all right if you added the language which we have in No. 8.

The Court: I have No. 8 before me. Do you have it?

Mr. Kenny: Yes, the third paragraph of No. 8 says, "Such a circumstance legally exists where the so-called independent contractor or businessman gains his livelihood as the result of his own labor

and the use of his own tools and where, as an individual,"—and this is the thing we need—"he lacks equal bargaining power in his dealing with those from whom his livelihood is gained." That is Justice Rutledge's language.

The Court: No, I just looked at your Instruction No. 8 again. I do not think it fits here. I think that this would cure the basis of your objection. Do you have that language?

Mr. Dixon: Yes, your Honor.

The Court: "An association of independent producers or of persons who are self-employed [126] and who are engaged in business on and for their own account and profit, free from such controls as an employer ordinarily exercises over a person who is an employee, would not be a labor union."

Mr. Rubin: I think that covers the Hearst case and the Milk Wagon Drivers case.

Mr. Dixon: In other words, strike out beginning line 7 with the words "as that term?"

The Court: "As that term is generally used," and ending with the word "employer" on line 10.

You do not agree with that, I take it, and object to it on all the grounds stated?

Mr. Kenny: That is right. It doesn't go the whole way, as we see it.

The Court: I think it covers the basis of your objection. Let us pass to the next paragraph.

Now you come here to the individual, it seems to me, and takes care of the objection which you have been making, except that I think this isn't quite correct.

Mr. Margolis: This says "persons who work for wages or salaries, that is to say, are employees of the fish dealers," which is a departure from the language which your Honor just outlined, it seems to me.

Mr. Dixon: The latter part of that, "or who stand in the relationship of employees to the fish dealers," is intended to cover your latter situation.

Mr. Margolis: It seems to me that it is just confusing to have it—you see, you have, "that is to say." In other words, you equate wages and salaries and employee relationship.

Mr. Dixon: It "consists of persons who work for wages or salaries, that is to say," etc., or "consists of persons * * * who stand in the relationship of employees to the fish dealers."

Mr. Kenny: The difficulty with this next sentence is that it purports to be an instruction favorable to the defendants. In other words, the Court after the comma goes on to say you "may join together and carry on," and so forth.

Mr. Margolis: I think what ought to be stricken is "consists of persons who * * * are employees of the fish dealers or who stand in the relationship of employees to the fish dealers."

The Court: I think that would be enough, "consists of persons * * * who stand in the relationship of employees to the fish dealers." I think that would be sufficient.

Mr. Dixon: All right.

The Court: So we will strike out "who work for wages or salaries, that is to say, are employees

of the fish dealers or," so that it now will read "consists of persons who stand in the relationship [128] of employees to the fish dealers, I charge you that the members of said association may join together and carry on acts to effect changes in the terms and conditions of their employment, even though their acts may affect or obstruct interstate or foreign commerce and that in doing so they would be pursuing a legitimate objective, period."

Mr. Margolis: Where is that?

The Court: Line 21. I strike out the words "of a labor union." That then meets your objection that the individuals are not covered.

Mr. Margolis: Of course we think what should be added there, your Honor, in addition to standing in the relationship of employees to the fish dealers, "or who are selling their labor."

Mr. Kenny: Products of their labor.

The Court: No.

Mr. Margolis: Or the products of their labor. Either one of those two ought to go in.

Mr. Kenny: The word "only" I think in line 23 is objectionable because it does not include the other permissible restraints by joint action.

Mr. Dixon: Such as?

Mr. Kenny: The Fishermen's Cooperative.

Mr. Dixon: No. That has been covered in previous instructions. This is a labor union instruction. That is what you claim you are. [129]

The Court: I think this is related to this matter.

Mr. Margolis: I think from line 31 on to the end of that paragraph should be stricken. That is just the reverse of the other.

Mr. Kenny: You have stated the law and the rest of it is a formula for finding people guilty.

Mr. Dixon: No, I don't agree with you.

Mr. Rubin: That is a statement of what the law is.

Mr. Margolis: It is harrowing what has previously been said, because under your definition it is possible that prices, for example prices of newspapers, are boiled down to wages and when the newsboys get into a dispute with the newspapers over what price they shall pay the newspaper owners, for their newspapers, they do not cease to be employees. The Wagner Act says they still shall apply.

Mr. Rubin: But it says they must find that it shall not affect the employer-employee relationship. That is part of the findings.

Mr. Dixon: We previously pointed out the conditions under which you are protected, and then since you still claim you are a labor union we have to follow out with the other situation in fairness to balance the instruction. It would be one-sided otherwise.

Mr. Kenny: Then the last paragraph, I think your Honor indicated some disagreement with [130] while we were discussing the other motion to dismiss. That is clearly an attempt to hold that if boat owners and non-boat owners are in the same

union, that is a vertical conspiracy under the Brimms case and the Allen Bradley case.

Mr. Dixon: Which we believe is the law, your Honor.

Mr. Rubin: Surely.

The Court: I think that is the law, but that isn't the basis upon which you charge it.

Mr. Kenny: Precisely.

The Court: You allege that they are independent businessmen; you do not allege that it is a combination of independent businessmen and the others.

Mr. Dixon: But you have a situation here where you have the record showing about 54 per cent of them regard themselves as self-employed, and certainly if the balance of them have combined, even though they are employed with somebody else and they are therefore properly engaged in the activities or are members of a labor union, that type of a combination would, under the Allen Bradley case, be an illegal combination.

The Court: I think it would be, but I do not think that that is what you charge.

Mr. Dixon: For the purpose of presenting the position of the Government, you really have to have the situation covered because otherwise the jury might well conclude, this is an organization of businessmen but the instructions don't cover the [131] other possibility, and therefore since they are a labor union perhaps because they have got employees in it, and the record shows that they have people in there who regard themselves as employees, whether for the canners or anybody else, that if

they combined with independent producers or independent businessmen, so-called, we think that the Allen Bradley case would apply if they combined in some organization.

Mr. Rubin: Don't forget that Instruction No. 5 is to be preceded by Section 6 of the Clayton Act. Now with that in mind, Section 6 of the Clayton Act talks about legitimate objectives of these labor groups, and the Allen Bradley case was specific on the question as to these unholy alliances between labor and non-labor groups. That is the reason this is important. If they have the statute there then we have a right to show the modification of the statute by the Allen Bradley case. It might be a legitimate objective of labor, and that was true in the Allen Bradley case, but where it is a legitimate objective of labor, even so it is sought to be obtained in combination with a self-employed group, then that is illegal.

Mr. Kenny: Without debating the law, it is still a brand-new law and a different conspiracy than one alleged in the indictment.

Mr. Rubin: No, it simply modifies the instruction that you want for your defense. [132]

The Court: I think it is covered because I say, "An association of independent producers or of persons who are self-employed and who are engaged in business on and for their own account and profit, free from such controls as an employer ordinarily exercises over a person who is an employee, would not be a labor union." Now that covers the self-employed phase and the man apparently who is a

fisherman who shares without owning his boat who regards himself as self-employed.

Mr. Rubin: If that were the situation and that were the avowal by these defendants, why then I grant you we would not have the necessity for that paragraph. But I don't think that is what it will be. I don't know.

The Court: I think that is a matter of argument.

Mr. Rubin: They are going to argue, "let's say we have 54 per cent who are self-employed," and then they will say, "well, let's talk about the other 54 per cent who are employed." By whom are they employed? Well, they are either employed by one of two groups, either employed by the boat owners or they are going to boat owners," or they are going to contend they are employed by the fish dealers. And that will be the sole purpose of talking about labor at all. In either case, whether employed by the boat owners or the fish dealers, if there is a combination between those employees, if they are employees—and they will so argue, I assume—and non-employees, then of course that is illegal [133] under the Allen Bradley case.

Mr. Margolis: You have to indict them on that. Let's assume that is the correct law, which we don't agree with, then they would have to be indicted on that charge.

Mr. Rubin: Because what we are endeavoring to do is refute your defense. Your matter is defensive matter. We don't have to indict them on that.

Mr. Margolis: But you charge a combination of businessmen.

Mr. Rubin: That is right.

Mr. Margolis: Then you ask a conviction on the basis that it is a combination of businessmen and non-businessmen.

Mr. Rubin: No. What we say is this, if you contend the evidence shows that there are employees here who weren't businessmen, our position is that even if that were so these employees do not have the right to combine with the businessmen, as we have shown under the Allen Bradley case.

Mr. Margolis: And because of that combination——

Mr. Rubin: Because of that combination you do not have the defense of Section 6 of the Clayton Act. It is a defensive matter.

Mr. Dixon: It is not a question of charging a separate violation here.

Mr. Rubin: If you will stipulate in the record that the crew members who are not self-employed are joint venturers or partners, this whole thing can go out, I think. But you won't do it [134] because you are going to argue it.

Mr. Kenny: They are not joint venturers.

Mr. Rubin: Who are they employees of, would you say? The boat owner?

Mr. Kenny: I don't say that they necessarily have to be on a regular pay roll.

Mr. Rubin: Who are they like employees of?

Mr. Margolis: We say the relation between none of these fishermen is the same. There is no difference between the boat owner and the non-boat

owner. One man happens to own the tools with which all of them work, that is all.

But here this adds a brand-new charge to the indictment, a new kind of a thing that we weren't apparently charged with and we weren't prepared to defend against, and weren't given any notice of.

Mr. Dixon: There is no notice required. The facts are——

Mr. Rubin: Just a second. With that last statement maybe we can check it.

(Conference between counsel.)

Mr. Kenny: If this practice of boat owners and boat pullers acting jointly in association is a U. S. v Brimms or a Borden case, why they can go out and indict us for it. But they haven't done it this time. [135]

Mr. Rubin: You go out and defend on the ground that you are a labor union.

Mr. Dixon: Your defense is that you are a labor union. At least that is what your opening statement indicated. We feel that it is necessary therefore to cover, as far as the evidence in this case is concerned, the extent to which that is a defense, and that is the only purpose of inserting the last paragraph of this Instruction No. 5, because otherwise it would be wholly an incomplete instruction on the evidence adduced here. There is still a question of fact for the jury to find, what kind of an organization you are and whether the members of the union, assuming they find that you are a labor union, also conclude whether you are non-employees or businessmen.

Mr. Margolis: But that is already covered.

Mr. Dixon: We haven't covered it.

Mr. Margolis: You say: "If you find as a fact that the membership of defendant Local 36, IFAWA, consists of persons who stand in the relationship of employees to the fish dealers, I charge you that the members of said association may join together * * *" You have already said that.

Mr. Rubin: Suppose you contend that the crew members are employees of the boat owners. Then where does that leave us under that instruction?

Mr. Margolis: We are not making any such contention. [136]

Mr. Rubin: Will you disavow it before the jury? That might solve the question. We have to just anticipate what you fellows are going to argue in your defense, that is all.

Mr. Margolis: Our position is that the boat owners and the boat owners and the boat pullers are in exactly the same relationship to the market dealers.

Mr. Rubin: To the market dealers, but how about the relationship to each other?

Mr. Margolis: There are some differences in their relationship, obviously, but we are only concerned with their relationship with the dealers. But this says, "If you find as a matter of fact that the membership of defendant Local 36 IFAWA, consists of persons who stand in the relationship of employees." Now if you are going to add another charge on verticle combinations, then you would have to amend the indictment.

Mr. Rubin: No. It all depends on whether you contend that is a defense.

Mr. Kenny: The jury could take that one paragraph and decide the case on it. They could rule in our favor on every other thing and say, "Look here, the judge said if boat pullers and boat owners are in combination it is an illegal combination."

The Court: The question here is whether or not under the evidence in this case that boat puller is an independent businessman. [137]

Mr. Rubin: I think that is right.

The Court: That is the question.

Mr. Rubin: And we need that instruction, unless they will disavow the fact that there is no other relationship between the puller and the owner. They might say, "well, the boat puller is an employee of the boat owner, therefore the boat puller has a right to do these things which gives arise to a labor dispute."

Mr. Kenny: There is no privity that arises between the boat puller and the fish dealer by virtue of his relation with the boat owner. That privity exists on a parity with the boat owner's privity.

Mr. Rubin: You and your associate are apart on that then.

Mr. Margolis: No, I said exactly the same thing.

Mr. Rubin: I misunderstood Judge Kenny then.

Mr. Dixon: We feel, your Honor, as I said, that this is an instruction on an affirmative defense. That is the first and obvious point that we want to make. If it is an affirmative defense it is of course directed to the evidence in this case and nothing else.

Now, the evidence in this case already in and not in dispute I think indicates that 54 per cent of these people or more own and operate boats on their own account. The balance [138] of the membership consider themselves as being employees of somebody. All they say is "employees."

Now under the previous portion of this instruction I think they would be entitled to argue that this is a labor union composed in part at least of employees, of somebody, presumably they can then argue they are employees of the dealers, and then the whole instruction about a labor dispute would come into play and the government would be left without any answer to it unless this portion of the situation, where you have a combination of employers and employees, so-called, in the same group, or same conspiracy, would be applicable.

Mr. Margolis: Maybe you indicted these people for the wrong thing.

Mr. Dixon: No, this is an affirmative defense.

Mr. Margolis: Let's knock this affirmative defense thing in the head. They have alleged positively as part of their indictment that the people are not employees, that they do no bargain collectively, that they do not market collectively, and they felt if necessary to make it part of their indictment. They themselves have taken the burden upon themselves to prove it.

Mr. Dixon: And you say they aren't employees.

Mr. Margolis: That doesn't make it an affirmative defense. It is part of this indictment.

Mr. Dixon: The jury is entitled to have the benefit of [139] the full statement of the law covering any situation that may be disclosed by the evidence with reference to labor unions, if that is one of your defenses.

Mr. Margolis: Even though it covers a charge not involved in the indictment?

Mr. Rubin: It is not a charge.

Mr. Dixon: We didn't charge you with being a cooperative, and you have an instruction on that.

Mr. Margolis: But you said we weren't a cooperative.

Mr. Dixon: We allege the fact as set forth.

The Court: The long and short of this paragraph here is what I said a while ago, isn't it, that the position of the government is that they are not employees because they go out and catch fish and sell the fish for what they can, and the position of the defendants is that they are labor, not necessarily that they are employees but that they are labor and exempt under the act, because the wages that they get they get from the fish that they catch. That was a very unclear statement, and if you know what I am talking about, that will be something.

Mr. Rubin: The whole thing resolves itself—we have no way of knowing how they are going to argue these facts so we have to anticipate their argument.

The Court: I understand.

Mr. Rubin: Now if they are not going to argue the question of employee relationship between the boat owner and boat puller, I don't think we need

this paragraph either. If they are, we need it and we are entitled to it. That is our position.

Mr. Kenny: I think we can assure counsel we are not going to argue that. We are not going to argue that the boat owner is the employer of the boat puller or conversely, that the boat puller is the employee of the boat owner.

Mr. Rubin: Or that there is any labor dispute between them?

Mr. Kenny: Or that there is any dispute between them. Conversely, we show that they are all literally in the same boat.

Mr. Dixon: What about a labor dispute between those people who regard themselves as employees of somebody, and the fish dealers?

Mr. Kenny: We will argue that all of them are.

Mr. Dixon: Then we submit we should have this instruction to cover that possibility. Let the jury decide whether they are or are not.

Mr. Kenny: This will give the jury an entirely new theory to rule against the defendants. It would be isolated from everything else and be made the basis for a verdict.

Mr. Rubin: I don't think so.

Mr. Dixon: If they find, as stated here, yes, I agree [141] with you; but they have to make a finding of fact before they can find your clients guilty.

Mr. Kenny: What you have alleged here is absolutely true, that this union includes boat pullers and boat owners.

Mr. Rubin: Then that makes it an illegal combination.

Mr. Kenny: That is right.

Mr. Rubin: That deprives you of the defense of a labor dispute. That is our point.

Mr. Kenny: Of course that is something else. We say it is simply not the law and it is a perversion of the Brimms and Allen Bradley doctrine and something entirely new that has not been urged in the indictment.

Mr. Dixon: If the Court please, I think it could be put this way rather simply: If you have a labor union which is composed of employees——

The Court: Let me write something down. Assume that I omitted the last paragraph, about which you are complaining, but add on line 14 on the first page of the instruction, immediately following what is not a labor union, the following: "In this connection it is not contended by the defendants that any of the defendants have the relationship of employee and employer to any other defendant"?

Mr. Rubin: Of course if you related it to the defendants, if your Honor please, that wouldn't apply. You would have to relate it to the members of the union because obviously [142] Mr. Zafran is an employee of Local 36. It wouldn't refer to the defendants, it would refer to members of Local 36. I think that is what you have reference to.

The Court: Yes. In other words, what I am trying to get around is your idea that the fellow who fishes on a share of the lay is an employee of the fellow who has the boat. That dispute isn't here.

Mr. Dixon: That is right.

Mr. Kenny: That is right.

Mr. Dixon: You might have it though, and I think properly so. They might under certain facts have such a dispute. It is not in this case, however.

The Court: That dispute is not here.

Mr. Dixon: No.

Mr. Rubin: That might suffice, if the further statement were made that it is not contended that there is any different relationship between the boat owner and boat puller, on the one hand, and the dealer on the other.

Mr. Kenny: Wait a minute. Now you are getting off into something else.

Mr. Rubin: No. What you are saying is that the boat owner and boat puller, you stated before, occupy the same relationship to the dealer under your contention.

Mr. Kenny: That is right.

Mr. Rubin: I think if that is added that would suffice. [143]

Mr. Margolis: I think the thing that should be put in there is that it is the contention of the defendants that the boat puller and the boat owner stand in the same relationship to the dealer.

The Court: Stand in the same relationship to the dealer regardless?

Mr. Kenny: Relationship between themselves.

Mr. Rubin: If that is added to the judge's statement, I think that will do it. Then that would take of the relationship to each other and the relationship as among themselves with the dealers. It would make them all employees or all independent businessmen. That is about the effect of it.

The Court: That is right. I think either all of the defendants should be acquitted because they come under Section 6 of the Clayton Act, or none of them should.

Mr. Rubin: That is right.

Mr. Margolis: That isn't necessarily right, for this reason——

The Court: That is absolutely correct.

Mr. Margolis: In spite of the fact that I have made my point, let's assume that the jury were to find that certain of the defendants are not independent businessmen as charged in the indictment——

The Court: Then they have to find them all not guilty.

Mr. Rubin: Pardon me, the defendants or the members, which? [144]

Mr. Margolis: Let me finish.

Let's assume that the jury finds—the point is that this indictment charges a combination of businessmen. If this is any other kind of a combination except a combination of businessmen, they may have violated the law in sixty-six thousand other ways but the indictment has not been established.

Mr. Rubin: That is a question of defense again.

Mr. Margolis: I am not talking about defenses. The point is, one of the things that is charged is that this association is a combination of businessmen. Now they could have been charged as a combination of businessmen plus employees. They could have been charged, and you might have had another good count. But that wasn't charged. Now if it

is established—it is just as if they had proved that they were guilty of murder under an indictment which charges them with a violation of the antitrust laws—they are charged here as an association of businessmen and unless they prove that they are an association of businessmen, it is just too bad.

Mr. Dixon: Not at all, your Honor. I think that is not the law.

Mr. Rubin: And that is precisely the reason for that paragraph, because you are contending that part of these people may be somebody's employees and we say even if it is so it is illegal.

Mr. Dixon: This is a conspiracy charge and one of your defenses is that you have a right to conspire, and your argument and contention is that you have a right to conspire because you are laborers and that this is a labor union, and for that reason you have a right to do the things charged in the indictment.

Now it is one of the questions of fact for the jury to decide, whether or not you are a labor union and, if you are a labor union, what protection if any you have from the law or under the law for doing the things charged in the indictment.

Now this instruction covers the situation where the labor union is involved, and there is a labor dispute involved, and the action must be justified under those circumstances by the defendants and the union. And don't forget that the union is also indicted here.

Now this instruction that you complain of, or that portion of the instruction which you complain

of, deals with the situation where the union itself or its membership is composed of independent businessmen as well as employees, and it is for the jury to decide. And it is one of the things I understand you are going to argue, whether they are employees or laborers or what they are. [146]

Now if you are going to argue that point, then I think the government is entitled to an instruction covering a possibility, based on the evidence in this case where the evidence shows that some of your cards say self-employed and others say employed, which latter designation would clearly to the jury at least indicate an employer-employee relationship with somebody.

Mr. Margolis: Let's assume that a defendant were charged with obtaining property by fraud and deceit. He comes in and proves, as his defense, that he stole that property. He just went in and stole it. There was no fraud, no deceit involved at all. He could not be convicted under a complaint or an indictment charging him with obtaining property by fraud and deceit for having stolen that property.

The Court: They have limited that so that it is just plain larceny now.

Mr. Margolis: I know, but I am just giving that as an example, that you may have a defense to a particular charge which very defense proves you guilty of another crime, and yet it is a good defense to the particular charge with which you are charged.

Mr. Rubin: There is only one crime here.

Mr. Margolis: Let me finish.

Now here either they are guilty of the combination, of the type of combination which is charged in this indictment, [147] or they are not guilty at all. One of their defenses may be that they have a different and entirely different type of organization, that is itself illegal—we will concede that for the purpose of argument—but if it isn't the kind of combination charged in the indictment then there can be no conviction under this indictment.

Now what they are saying here, in effect, is that you must find them guilty whether it is the kind of a combination charged in the indictment, i.e., a combination of businessmen, or an entirely different kind of combination which is not charged in the indictment, a vertical combination of businessmen and workers.

Mr. Rubin: You are absolutely right. They certainly would be because they are not charged with the crime of being independent businessmen, they are charged with the crime of conspiracy, and it doesn't make any difference whether they are independent businessmen or it is a vertical combination.

Mr. Margolis: A combination of independent businessmen.

Mr. Rubin: That is not the charging paragraph. It describes them, that is all. Suppose you charged a man as a white man with murder and he turned out to be a colored man, he would still be guilty.

Mr. Margolis: But who is charged with a combination here?

Mr. Dixon: The defendants named herein, of which the union is one. [148]

The Court: I keep listening to you discussing this and you keep talking about all the members of the union. We only have 16 defendants here.

Mr. Dixon: But the union is also indicted.

The Court: I know, but not all the members of the union. It says here, "If you find as a fact that the membership of defendant Local 36 * * * is a labor union." I do not define a labor union here.

Mr. Dixon: That is right. That will have to be defined, that portion of it.

The Court: Let us take it word for word.

"If you find as a fact"—we will leave that much in—"that the defendant association is a labor union as previously defined"—strike out "as previously defined"—"and if you further find that the members of said union also include non-employees or businessmen who are self-employed"—that is very confusing, or I am confused.

Mr. Dixon: I think the difficulty, your Honor, arises from the fact that we have stricken from the instruction the definition of labor union so that there is no form now to determine that.

The Court: I think I have set that forth: "If you find as a fact that the membership of defendant Local 36, IFAWA, consists of persons who stand in the relationship of employees [149] to the fish dealers * * *"

Mr. Dixon: Would not be a labor union. It is a negative definition. In other words, it doesn't tell them what a labor union may be.

The Court: Suppose we said, beginning on line 9, "If you find that the members of Local 36 include non-employees or businessmen who are self-employed or engaged in the business of catching and selling fish on their own account * * *"

I still think that the matter can be solved by one short instruction which somebody ought to be able to couch to the general effect that all the defendants are in the same boat. I think they are. They either are or they are not. That is, so far as this instruction is concerned, and so far as this is concerned with the defendants.

Mr. Dixon: You see, the Clayton Act uses the word "Norris-LaGuardia Act," "legitimate labor objective," "labor union," etc., and that is why it makes it so difficult. Frankly we spent considerable time on this. It was quite a job to work this thing out. It isn't perfect by a long way.

How about something like this: The members of the defendant association include non-employees or businessmen who are self-employed, and so forth, as well as employees?

The Court: It is immaterial in considering this whether the defendants are guilty or not guilty.

Mr. Dixon: Any defendants whom you find are engaged in [150] such a combination, or combined with independent businessmen. In other words, you have in this case the matter of price-fixing.

Mr. Rubin: Maybe we can do it this way: Take out everything up to the word "defined" so that it reads: "If you find that the members of defendant Local 36 include non-employees or businessmen

who are self-employed," etc., "I charge you that the members of a labor union cannot in the same organization combine with independent businessmen." I think that ought to do it.

Mr. Dixon: "and thereafter engage in any activity or conduct in combination with such independent businessmen which has as its purpose the fixing of prices of fish."

Mr. Rubin: That is right.

Mr. Dixon: I think it would be all right from there on.

Mr. Rubin: Strike out everything up to "and" so that it says, "If you find that the members of defendant Local 36 include non-employees or businessmen who are self-employed or who are engaged in the business of catching fish, I charge you that the members of an organization cannot in or outside their organization combine with." How does that sound?

The Court: How would this be: "In connection with your consideration of this phase of the matter, it is immaterial whether or not any of the defendants owned or operated his own boat or fished for a share of the lay. The matter of [151] whether or not the defendants come under Section 6 of the Clayton Act is to be determined by the relationship of the defendants to the fish dealers and not to one another."

Mr. Rubin: That limits it only to the defendants, whereas the indictment refers to all the members of the union.

Mr. Dixon: The union is indicted here too.

The Court: It is still a defendant and it does not make any difference about the other membership in the union. The defendant Local 36 may have some employees who are deck hands, scrubbers, cooks, water boys, and so forth, but if they did combine and conspire as you alleged here to control the price of fish then they are guilty, so it makes no difference as to what their whole membership was.

Mr. Rubin: Except that they may contend—that is all right if they don't contend that they are employees. They may say that there is a labor dispute here in which case we will be up against another problem.

The Court: That is half of what their whole argument is about. They do say there is a labor dispute, but they say there is a labor dispute because these defendants here are paid by the price of fish.

Mr. Rubin: When you say defendants, would you add in that instruction, “and the members of defendant Local 36”?

The Court: In connection with your consideration of this phase of the matter, it is immaterial whether or not any [152] of the defendants owned—I would say whether a defendant instead of any of the—whether a defendant owned and operated his own boat or fished for a share of the lay. The matter of whether or not the defendants come under Section 6 of the Clayton Act is to be determined by the relationship of the defendants—that is all of them, the union and all the members—to the fish dealers and not to one another.

Mr. Rubin: Judge, I think if I may state, I believe that would be misleading because the jury is then going to consider each individual defendant, just those that we have indicted here.

For example, Mr. Kibre, as business agent, has no relationship to the picture we have been drawing here at all.

The Court: He has a relationship to the fish dealers.

Mr. Rubin: He is the business agent of a union. There has been no testimony at all concerning his relationship to the fish dealers. Actually our problem here is, what is the relationship between the members.

The Court: Yes. There is testimony concerning his relationship to the fish dealers. That is your testimony. And he conceded and admitted on the witness stand that he was arguing with the fish dealers. So it isn't a question of whether Kibre is employed by the union or Zafran is employed by the union or Joe Doakes fished on a share of the lay or George Knowlton owned his own boat. It is a question of what [153] the relationship was with the fish dealers.

Mr. Margolis: As far as the Clayton Act is concerned.

The Court: As far as the Clayton Act is concerned.

Mr. Rubin: When you talk about the union, for example, the union is only important in this case because of the members of the union. Actually what the jury has to decide, as I understand it, is what

is the relationship between the members of the union, not necessarily just those that we have picked out here. We might have picked out people here who weren't even fishermen but who were conspirators. The problem involved in this defense is what is the nature of the relationship between the members of the union who are to be the beneficiaries under this contract. So if you lump the union as a defendant and limit that only to the 16 people before this court they are going to say, "Well, Mr. Kibre, there is no situation there, and Mr. Zafran, he is the secretary-treasurer, and somebody else here only fished two months out of the time, we will just acquit all these people." But the subject of the conspiracy was not their relationship to the dealers but the relationship of the people under the contract.

The Court: We are not talking about the subject of the conspiracy now; we are talking about the contention of the defendants that they are exempt under Section 6 of the Clayton Act. [154]

Mr. Margolis: That is what was wrong with this whole last paragraph because you are talking about the Clayton Act and you get into a question of the conspiracy. The way the judge puts it, it relates to the Clayton Act.

The Court: I see here—and everybody has passed over this with all your objections—on the first page, line 14, "If you find as a fact that the membership of defendant Local 36, IFAWA, consists of persons who stand in the relationship of

employees to the fish dealers, I charge you that the members," and so on. That is all you are concerned with here, it seems to me.

Mr. Rubin: That is the defense. We want to get the converse.

The Court: That the union "consists of persons who stand in the relationship of employees to the fish dealers." Under the Clayton Act, if they find that the membership of that local, that is, all of them, stand in that relationship of an employee to the fish dealer, then they can combine and conspire and a labor dispute exists, and so forth.

Now I am saying here, to eliminate the idea that will get over to the jury possibly, and to eliminate any confusion that they may be employed by some fellow who owns his boat, it looks to me like this covers it.

Mr. Dixon: I have a suggestion here in the alternative, but I won't make it until your Honor is through. [155]

The Court: "In connection with your consideration of this phase"—now that would go right through following line 7 on the second page and would eliminate the last paragraph; that is, this whole phase starts out with the Clayton Act—"In connection with your consideration of this phase of the matter, it is immaterial whether or not a defendant owned and operated his own boat or fished for a share of the lay." Now that takes out any suggestion of possibility here that you are trying to say that they conspired with the fellow who worked for a fisherman and the fellow who owns his boat and was an independent fisherman.

Further: "The matter of whether or not the defendants"—that is the only ones we are talking about, and all of them here—"come under Section 6 of the Clayton Act is to be determined by the relationship of the defendants to the fish dealers." And that is the standard we just set up back here.

Mr. Rubin: Yes, your Honor, with one qualification, that the standard you set up in the first place talks about all of the members and it doesn't refer to it there.

The Court: The defendant Local 36 is a defendant.

Mr. Rubin: Is an entity, that is correct.

The Court: That is right.

Mr. Rubin: But the standard we set up before, which your Honor just read, talks about the members of Local 36, [156] which is an entirely different matter. There are some hundreds of members who occupy different relationships possibly, but here now it is being limited to the second paragraph just to those who are before the jury. That is the reason that the suggestion was, if you said the individual defendants or the members of Local 36, then I think that would come closer to the true situation. You have two standards. The first one talks about the member of Local 36. Local 36 is just an association. It doesn't mean anything. It is just an idea on paper. But when you talk about the members of it, as you did in the first portion of the instruction, then I think we come closer to the true picture.

Mr. Margolis: We are to a point where we are indicting ideas.

No. 11638

**United States
Circuit Court of Appeals
For the Ninth Circuit**

LOCAL 36 OF THE INTERNATIONAL FISHERMEN AND
ALLIED WORKERS OF AMERICA, JEFF KIBRE,
GILBERT ZAFRAN, CLIFFORD C. KENNISON, F. R.
SMITH, GEORGE KNOWLTON, OTIS W. SAWYER,
W. B. McCOMAS, HARRY A. McKITTRICK, ARTHUR
D. HILL, C. LLOYD MUNSON, CHARLES McLAUCH-
LAN, ROBERT M. PHELPS, BURT D. LACKYARD,
and RAY J. MORKOWSKI,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

**Transcript of Record
In Six Volumes
VOLUME V
Pages 1903 to 2250**

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Central Division

FILED
DEC 11 1947



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Mr. Dixon: May I make this an alternative suggestion, Judge?

The Court: Yes.

Mr. Dixon: Strike everything from lines—well, strike the first sentence of the paragraph that we are talking about.

The Court: The first sentence?

Mr. Dixon: Yes. "If you find as a fact that the association is a labor union, I charge you that the members of Local 36 cannot"——

Mr. Margolis: That gets away from the Clayton Act, again.

The Court: Wait a minute.

Mr. Margolis: The virtue of your Honor's instruction and the vice of this one is that one is related to the Clayton Act and the other one is not.

Mr. Dixon: We are trying here to cover what is a legitimate labor activity which we have previously referred to. I think that as long as we have described what they may do we have got to show what they may not do if they are a labor union. I am eliminating here anything about a labor union which I think——

Mr. Margolis: There may be a thousand things which they may not do as a labor union for which they could not be convicted under this indictment.

Mr. Dixon: Certainly this is the law. As "such a combination would not constitute a legitimate labor activity." And I previously said, "or combination which has as its purpose the fixing of prices as charged in paragraph 12 of the indictment," which is what they are charged with.

Mr. Margolis: Your Honor's instruction, it seems to me——

Mr. Kenny: I was going to say the government doesn't need to worry about Kibre. If he is acquitted and these working fishermen are convicted he would have to leave the union anyway.

Mr. Dixon: I think that would obviate it, Judge.

Mr. Margolis: We will be fired if we argue for Kibre.

Strike the words "a labor union cannot in the same organization".

Mr. Rubin: I think——

Mr. Dixon: In connection with what I just said, "I charge you further"——

Mr. Rubin: Yes, "cannot in the same organization combine for the purpose of fixing prices."

The Court: Then leave out "with independent business men."

Mr. Margolis: I think your Honor's statement is clear and concise and covers the situation.

Mr. Dixon: I don't think so. I think it is confusing.

The Court: Let's write it out on the typewriter.

Aren't you repeating what you said in the previous paragraph? "If you find that there is a controversy between the members of Local 36 and the fish dealers * * * such a controversy does not involve * * *"—there you say "members."

Mr. Rubin: That part, if your Honor please, has to do with a labor dispute defendant Local 36 and the fish dealers. The second situation has to do with a hybrid organization that has both employees

of anybody and employees of nobody, and if they get together and combine then it is illegal under the Allen Bradley case.

Mr. Dixon: Whether they are employees or not.

Mr. Margolis: We are getting right back to the thing that is not what is charged in the indictment, and the point is that under the Clayton Act, if we raise the defense of the Clayton Act, as your Honor has stated, we cannot——

Mr. Dixon: This is stating not the same thing that has been previously stated, because we have previously indicated the conditions, the things that they may do as a labor union, what are legitimate labor objectives under the law; we are here charging the limitation as laid down by the Supreme Court on legitimate activities of labor and I am using that term in a broad sense now, whether it is the Clayton Act or labor union, or whatever it may be called, because such a combination and activity, namely, a combination between members of an organization with independent business men,—let the [160] jury decide whether it is applicable or not.

The Court: But this was not a combination between all the members of Local 36. This is a conspiracy between Local 36 and some of its members.

Mr. Rubin: We charge that defendant Local 36, the Association, was a party to the conspiracy.

Mr. Dixon: That's right.

The Court: I know you do. But you don't charge all the members with being a party to the conspiracy.

Mr. Dixon: Only by charging the Association as a defendant.

The Court: The Association is an artificial being and acts through its officers and memberships.

Mr. Dixon: But it is an entity for the purposes of being indicted.

The Court: That is correct.

Mr. Margolis: It could be guilty without all of its members being indicted.

Mr. Dixon: It could act through its members.

Mr. Rubin: They are insisting that the members are acting together for the purpose of being a co-op.

Mr. Margolis: Whether all the members were in a conspiracy is another thing.

Mr. Rubin: We don't care to show they are all in the conspiracy. We care to show the nature of the membership, and [161] we have done so in stating that if they are partly employed and partly not employed that is an illegal combination.

Mr. Margolis: I think your Honor's instruction takes care of that.

The Court: Suppose I add another sentence here, "And it is also immaterial whether or not all of the membership of Local 36 were independent business men or were employed by some one."

Mr. Rubin: That would be material, I think, because there might be a labor dispute here.

Mr. Dixon: They have a perfect defense to this case if the jury finds there is a labor dispute.

Mr. Rubin: And there is no vertical combination, that is true.

Mr. Dixon: Under the law there isn't any question about it. And they want to go to the jury on the question of whether there is a labor dispute.

Now, we say if they want to go to the jury on this phase of the case as a defense, then, we would be entitled to show that the organization itself was composed of laborers and independent business men, and to argue that that combination, if they found such combination, would be an illegal combination in restraint of trade, provided, as we put down here. “* * * and I charge you that any defendants whom you find were engaged in such a combination would be guilty as charged in this indictment.” [163]

They are protected fully, but the jury——

Mr. Kenny: How about this? “It is immaterial whether or not a defendant or any other member of Local 36”—if you inserted that wouldn't that accomplish what you want?

The Court: That may do it.

Mr. Kenny: “whether or not a defendant or any other member of Local 36 owned and operated,” and so forth.

Mr. Rubin: Our position is that it is material whether they own or operate boats, because that is one of the things that makes them independent business men.

The Court: In connection with this, we are getting at. In other words, let me suggest this: that I read Section 6 of the Clayton Act, I then read that paragraph right there, and then go on with the rest of the instruction.

Mr. Kenny: That is all right.

Mr. Rubin: Wait a minute. With the rest of—

The Court: Leaving out your last paragraph. In other words, I read that directly after I read the Clayton Act.

Mr. Rubin: I think if that instruction were given that we would be entitled to an avowal by these defendants that they do not contend that there is an employer-employee relationship between the boat owners and boat pullers.

Mr. Margolis: We are not going to contend for the purposes of the Clayton Act. [163]

Mr. Rubin: What purposes would you contend it for?

Mr. Margolis: For one hundred other purposes. But this is an instruction under the Clayton Act.

Mr. Rubin: It isn't, and that is precisely why we need it in. With this instruction the defendants may argue anything before the jury. And I know your Honor is going to try to not interrupt them during this argument.

If that is your position, then I think you should be fair enough to disavow it so you cannot argue it.

Mr. Margolis: Suppose we want to say that your indictment is completely bad, regardless of the Clayton Act or anything else, because you have a complete misconception of the case?

Mr. Dixon: That has been ruled on.

Mr. Margolis: That doesn't stop us from arguing to the jury.

Mr. Rubin: Argue that to the jury?

Mr. Margolis: Yes, suppose we do want to argue that to the jury?

Mr. Dixon: Certainly we will object to that kind of argument.

Mr. Margolis: We expect a lot of objections to our argument.

Mr. Rubin: We are going to try not to object. That is why we are fighting it out today. [164]

If they are to take the position that there is no relationship I think they should state so to the court and put it in the record, because the court's statement that it is immaterial might be the basis for error if you contend it is material.

Mr. Margolis: We agree that this is a correct instruction.

The Court: In connection with the Clayton Act.

Mr. Margolis: That's right. As I understand it, this instruction deals only with the Clayton Act and nothing else.

Mr. Rubin: As to a labor dispute; now, it is certainly true, if your Honor please, regardless of the Clayton Act, and regardless of the Norris-La-Guardia Act, if there is even a labor dispute and this labor dispute has to do even with terms and conditions of employment, with wages, in fact, under the Allen Bradley case, nevertheless if there is an unholy alliance with non-labor or self-employed individuals, that is illegal. That is the law, and that is the purpose of the second portion. It has nothing to do with the first part of your contention.

Mr. Margolis: We are just going around and around.

Mr. Rubin: I don't think so. You are talking about a general exemption because you are labor,

and we are saying even if you are labor under your contention that nevertheless such a combination with non-labor is illegal. [165]

Mr. Kenny: There is no evidence here of any such combination.

Mr. Rubin: Then will you disavow that relationship?

Mr. Dixon: We want this instruction because the evidence does show non-employer relationship, and that is the theory of the indictment.

The Court: Does show——

Mr. Dixon: Non-employer relationship. This 54 per cent shows self-employed, that is the record.

The Court: Which I have said up here, that if persons are engaged in business for their own account and profit free from such controls an employer ordinarily exercises, that they are not a labor union. I have told them that.

Mr. Rubin: That is as to a labor union.

The Court: That is as to Section 6, and that is all I am dealing with.

“In connection with your consideration of this phase of the matter”——

Mr. Rubin: That is correct.

The Court: And that is all.

Mr. Rubin: That is the first part.

The Court: ——“it is immaterial whether or not a defendant or any other member of Local 36 owned and operated his own boat or fished for a share of the lay.” [166]

In other words, they are all in the same boat.

“The matter of whether or not the defendants come under Section 6 of the Clayton Act is to be determined by the relationship of the defendants to the fish dealers and not to one another,” instead of “or not to one another.”

Mr. Rubin: I would say that would be all right. Will Mr. Margolis state that is a correct statement of the law as applied to the facts in this case?

Mr. Margolis: We have no objection to this language.

The Court: Let me see. “The matter of whether or not the defendants come under Section 6 of the Clayton Act is to be determined by the relationship of the defendants”—should you add “the defendants and the members of Local 36”?

Mr. Rubin: I think that would help a great deal.

The Court: “To the fish dealers and not to one another.”

Mr. Rubin: I think that would help a lot, yes.

Mr. Dixon: I am pretty dense, Judge, but I don't see how it is going to help the jury. It is just going to tend to confuse them, rather than aid them, because the only reason that this last paragraph is applicable at all is because of the evidence in this case which is taken from the defendants' own records, which show that a great portion of the membership of this organization—and that is what determines what kind of an organization it is—at least it is one of the things [167] that helps the jury determine what they are—shows

that they are self-employed, and that a portion of them regard themselves as employed by somebody, we don't know who, maybe the canners, it may be the dealers or somebody else. On that state of the record of this association we think we should be entitled to argue that if there is that relationship, if you have a combination between independent business men—assume that the jury finds that some of them are in that category as claimed by the government, and that the others are employees of somebody, so that the jury may know what the law is as applicable to that situation in the event there is a combination found between—as charged in the indictment—I think we ought to have an instruction covering it, and I frankly feel that this one doesn't cover it.

The Court: All right. Have you got your pencils? Add this: "It is immaterial whether or not a defendant or any other member of Local 36 owned and operated his own boat or fished for a share of the lay. The matter of whether or not the defendants come under Section 6 of the Clayton Act is to be determined by the relationship of the defendants and the members of Local 36 to the fish dealers and not to one another or to any other person."

Your point is the membership shows some of them are employed. That doesn't make any difference if they are not employed by the dealers. [168]

The whole sum and substance of the defendants' position with relation to the matter of their exemption under the Clayton Act is that their rela-

tionship to the fish dealers is that of an employer and employee; their economic bargaining power, et cetera, et cetera.

Mr. Margolis: As I understand it, so we get the order of things——

The Court: Just a minute. We will write it out here.

Mr. Margolis: We have it written out. The first one will be Section 5— Section 6 of the Clayton Act will be read.

The Court: I am not sure that is the proper order. It occurred to me after I said that. I think that is the place to put it. Read Section 6 of the Clayton Act.

Mr. Margolis: That will be followed by what your Honor just dictated?

The Court: That will be followed by this, and omit the last paragraph on the page.

I will read it again:

“In connection with your consideration of this phase of the matter, it is immaterial whether or not a defendant or any other member of Local 36 owned and operated his own boat or fished for a share of the lay. The matter of whether or not the defendants come under Section 6 of the Clayton Act is to be [169] determined by the relationship of the defendants and members of Local 36 to the fish dealers and not to one another or to any other person.”

I think that clears it up.

Reading again your last paragraph at the top of the page there about a labor dispute and so forth, it has got to be a labor dispute between—in order to fit into the defendants' contention—it has to be a labor dispute between the buyers of fish and the sellers of fish.

Mr. Rubin: Would you accept the court's last statement? Would you reread that? Maybe if we can get a commitment in the record to that effect we might have something.

(The record was read by the reporter.)

Mr. Margolis: To come under the Clayton Act, yes, that's right.

The Court: That is, to come under your contention.

Mr. Margolis: With regard to the Clayton Act, that's right. Our contention with regard to the Marketing Act is something entirely different. We have different contentions that you can't tie everything into the construction. We agree to this language as applied to the Clayton Act.

Mr. Kenny: I take it your Honor's ruling on our S-8, which was left open, I suppose——

The Court: That is out.

Mr. Kenny: That is refused? [170]

The Court: That is refused.

I forgot where I was going to put this in about picketing and boycotting.

“Evidence has been admitted in the case of picketing and boycotting. These acts in and of themselves are not contrary to or in violation of any law. * * *”

Where was I going to put that?

Mr. Kenny: I don't think we decided, your Honor.

The Court: Well, it can follow this one.

Mr. Rubin: That went in the second portion of the Marketing instruction, No. 4.

The Court: It can follow this just as easily. Isn't there a break here? I think that can follow government's No.—whatever the last one was.

Mr. Margolis: Government's 5.

The Court: All right. Government's 6.

Mr. Dixon: I am sure you are not going to object to 6.

Mr. Margolis: I think we can let 6 go.

Mr. Kenny: Yes, 6 is all right.

The Court: You haven't taken me into consideration.

Mr. Margolis: Your Honor doesn't mean that he is going to overrule both of us?

The Court: Government's 6 passed.

Mr. Margolis: 7 has already been discussed, your Honor.

The Court: We are back to government's 3.

Mr. Rubin: Pardon me. I think your Honor's instruction with regard to picketing and boycotting has specific reference to our instruction No. 4 with respect to forcing contracts, and so forth.

The Court: Yes, that's right.

Mr. Rubin: I don't think it should come after 5.

The Court: Where was that? It can go in there?

Mr. Margolis: Right after 4?

The Court: Yes.

Mr. Margolis: That is all right.

Mr. Rubin: Do you have a copy of the judge's instruction?

Mr. Margolis: We have a copy, thank you.

Mr. Kenny: We object to No. 3 because it negatives the rule of reason, and since we don't have the rule of reason instruction we don't need a negative.

Mr. Rubin: There is a lot of evidence, all this stuff they put in before the jury concerning economic justification, we submit, the jury should have an instruction on.

The Court: Yes, they should. Your objection to Government's No. 3 is overruled.

Mr. Kenny: I have one suggestion. On line 9 "are not justification for illegal price-fixing combinations or conspiracies," because your Honor has otherwise qualified it in the instruction by saying "price-fixing contracts otherwise [172] illegal," so-and-so, "unlawful combination," and so forth.

Mr. Rubin: You can say "for such price-fixing combination."

Mr. Kenny: "Illegal" would spell it out.

The Court: I think so.

Mr. Margolis: We do want to, however, state——

Mr. Kenny: Let's see if we have that.

The Court: "* * * for illegal price-fixing combinations or conspiracies * * *."

Mr. Margolis: We want to state our objections a little more fully. I think Judge Kenny merely stated it on the ground that we didn't have the rule of reason.

It is our contention that the rule of reason does apply to this sort of a situation, and our previous argument with regard to the Socony Vacuum Oil Company case applying to consumer prices and situations, which we have previously defined, and not to the situation here, is hereby incorporated by reference in our objections.

Mr. Kenny: Then there is just one other thing. I think the last sentence is, in addition to being repetitive——

The Court: Argumentative, I think.

Mr. Rubin: What is that?

The Court: The last sentence. I have told the jury that the reason for the law is none of their concern.

Mr. Dixon: All right. Take it out. [173]

The Court: On the next instruction there should be an addition.

Mr. Rubin: Which one is that, your Honor?

The Court: That is now No. 15, government's. This is the last one.

In the first line strike out "excuse or," and there should be added after the word "indictment" something to this general effect. Let me glance at it again.

"You are instructed it is no defense to those on trial that others not on trial, or not indicted, appear from the evidence to be implicated in the conspiracy alleged in the indictment, or to be themselves guilty of some other illegal combination or conspiracy."

Mr. Rubin: That is correct.

Mr. Margolis: How was that again?

The Court: Add after the word "indictment" "or to be themselves guilty of some other illegal combination or conspiracy."

In other words, it is no defense to these defendants that the fish dealers might be guilty of a conspiracy.

Mr. Margolis: I am just wondering about the order here. The way the government has 3, 4 and 5 following each other seems to me is the logical way of having these.

The Court: Well, I don't think so. I thought 3 more [174] nearly came in at the end of the business.

Mr. Margolis: The point is that it is a question of—those three deal with defenses; one of them says, "This defense doesn't apply," and the really important ones from the standpoint of the jury to consider are 4 and 5, where they might have something to consider. 3 is something to throw out of your mind.

The Court: I give them 4 and 5, and then I give them 3. In other words, in reading 4 and 5 their process of thought might come to 3, that is the reason I put it after 5, because that was the way it arranged itself in my mind, and being a very ordinary person it occurred to me that a jury of a cross section of the community would think of it the same way.

Mr. Dixon: In other words, No. 3 is to follow 4 and 5?

The Court: Yes.

Mr. Margolis: We feel it should precede them.

Mr. Kenny: We agree with the government on its order.

What about 16 and 17?

Mr. Margolis: I wonder, for the purpose of the record——

The Court: Let me recapitulate on these instructions so that you can make your record on it.

The instructions offered by the defendants——

Mr. Margolis: Is your Honor going to give them in the order they will be given?

The Court: The following instructions offered by the [175] defendants are refused: Defendants' instructions 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, S1, S-2, S-3, S-4, S-5, S-6, S-8, S-7, S-9, S-10, S-12, S-13, S-14, S-16, S-17, and S-18.

Mr. Margolis: May we at this time——

The Court: Wait a minute. ——on the grounds that have been heretofore indicated in the discussion.

Mr. Margolis: May we state, your Honor, at this time that we object to the refusal of the court to give each of these instructions and each and every part of each of these instructions on the grounds that the instructions correctly state the law applicable to the facts of this case, and that they are not otherwise adequately covered in the court's instructions.

The Court: All right. And the objections are overruled as I have indicated.

The government's proffered instructions G-9, G-11, G-12, G-13, and G-14 are refused for the reasons given.

Mr. Margolis: I didn't get that.

The Court: 9, 11, 12, 13 and 14 are refused for the reasons heretofore indicated.

Mr. Rubin: We will not object, if your Honor please, because our objections will avail us nothing.

The Court: I will cover it this way: Except for the general instructions which I indicated heretofore will take [176] No. 1, the following instructions will be given: —

Mr. Kenny: That will be Court's 1.

Mr. Margolis: What are the pages of the transcript, your Honor?

The Court: Beginning at page 48 to page 61 of the transcript. And the others which I indicated would be given. There were two others following it. Do you remember I read them to you? The failure of a defendant to take the stand, and a government officer having no special significance.

Mr. Dixon: Can we get copies of them?

The Court: There are only two very short ones.

The court's instruction No. 1 with the additions that I indicated in the early part of the session this morning will be followed by Government's Instruction No. 10, Court's Instruction No. 2, Government's Instruction No. 7 as modified, Government's Instruction No. 16, Government's Instruction No. 17, Government's Instruction No. 8, Defendants' Instruction No. 1, Defendants' Instruction No. 20, Defendants' Instruction No. S-15 as modified, Sup-

plemental 15, Government's Instruction No. 1 as modified, Government's Instruction No. 2 as modified, Defendants' Instruction No. S-11 as modified, Government's Instruction No. 4 as modified, another instruction which we will call Court's No. 3, that is about picketing.

Mr. Margolis: Court's 3 is picketing?

The Court: Yes, Court's 3 is picketing, following Government's Instruction No. 4, followed by Section 6 of the [177] Clayton Act, Court's No. 4, that is the one we wrangled about so much, Government's Instruction No. 5 as modified, Government's Instruction No. 6, Government's 3 as modified, Government's 15 as modified, to then be followed by the general concluding instruction which I read to you earlier this afternoon, beginning, "There is nothing peculiarly different in the way a jury should decide a case," and so forth.

Mr. Dixon: Judge, I think we overlooked, or maybe I missed it, the Marketing Act, Fisheries Marketing Act.

Mr. Kenny: That is Defendants' 11 as modified.

Mr. Margolis: If your Honor please, at this time we would like to object to each—to the modification of Defendants' Instructions on the grounds previously stated in argument, without repeating them, and we would like to object to the Government's Instructions which were given, and each and every portion of the Government's Instructions, on the grounds previously stated in argument and discussion of the individual instruction.

The Court: All right. Objections are overruled.

Los Angeles, May 7, 1947

4:25 o'Clock P.M.

(After recess.)

The Court: Usual stipulation?

Mr. Margolis: Yes, your Honor.

Mr. Dixon: Yes, your Honor.

The Court: Mr. Clerk, you have submitted the proposed form of verdict to counsel?

The Clerk: Yes, I have.

The Court: Any objection to it?

Mr. Margolis: No, your Honor.

Mr. Dixon: No, your Honor.

The Court: I propose to send to the jury at the conclusion a copy of the indictment, and I wondered if there was any objection if I sent this printed copy to them.

Mr. Margolis: No objection.

The Court: It has no markings of any kind on it.

Mr. Dixon: No objection.

The Court: And the exhibits which are admitted in toto but not those that are admitted piece by piece.

Mr. Margolis: Yes, your Honor.

The Court: Very well.

INSTRUCTIONS TO THE JURY

The Court: Ladies and gentlemen of the jury, at the outset of the trial I read you some general instructions concerning the method and manner and the rules for weighing evidence, and told you at that time that I would repeat them at the conclusion of the case. I did so with the consent of

counsel for both sides and in the hope that most of you who are strange to these proceedings might find some aid in weighing the evidence as it came in and giving you a determination as to the method of applying that method when the responsibility finally devolved upon you to respond with a verdict to the indictment in this case.

Now it is my time to instruct you on the law. The case has been rather long in trying. I hope it has not discommoded you too much, but you accepted your responsibility as citizens and now there will shortly devolve upon you the gravity of giving a verdict of guilty or not guilty as to these defendants.

It is your duty as jurors to follow the law as I shall state it to you and, on the other hand, it is your exclusive province to determine the facts in the case and to consider and weigh the evidence for that purpose. That authority vested in you is not an arbitrary power but must be exercised with sincere judgment, sound discretion and in accordance with the rules of law which I shall state to you in these instructions.

If in those instructions which I am about to read to you now, any direction or rule or idea is stated to you in varying ways, or a subject matter in the instructions is treated first or last or if it might be repeated, no emphasis is intended to be placed on that instruction and none must be inferred by you. For that reason you are not to single out any certain sentence or any individual point or individual instruction and ignore all the others, but

you have to consider all the instructions together and as a whole, and to regard each in the light of all the others.

Evidence may be either direct or indirect. Direct evidence is that which proves a fact in dispute directly without an inference or a presumption, and which in itself, if true, conclusively establishes the fact. Indirect evidence is that which tends to establish a fact in dispute by proving another fact which, though true, does not of itself conclusively establish the fact in issue but which affords an inference or a presumption of its existence. Indirect evidence is of two kinds, namely, presumptions and inferences.

A presumption is a deduction which the law expressly directs to be made from particular facts, and unless declared by law to be conclusive—and there are no conclusive presumptions in this case—a presumption may be controverted by other evidence, either direct or indirect, but unless so controverted the jury is bound to find according to that presumption.

An inference, on the other hand, is a deduction which the reason of the jury directs shall be drawn from the facts which are proved. An inference must be founded on a fact or facts proved and be such a deduction from those facts as is warranted by consideration of the usual propensities or passions of men, the particular propensities or passions of the persons whose conduct or acts are in question, or the course of business or the course of nature.

And the word "propensity" as used in these instructions means any natural or habitual inclination or tendency.

You are not bound to decide any fact or the main issue in conformity with the testimony or the number of witnesses which does not produce conviction in your mind as against the declarations of a lesser number of witnesses, or as against a presumption or other evidence which appeals to your mind with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of a greater number of witnesses merely from caprice or prejudice or from a desire to favor one side as against the other. It does not mean that you are to decide an issue by the simple process of counting the number of witnesses who have testified, but it does mean that the final test is not in the relative number of witnesses but in the relative convincing force of the evidence.

The testimony of one witness entitled to full credit is sufficient for the proof of any fact in accordance with such testimony even if a number of witnesses have testified to the contrary, if from the whole case, considering the credibility of the witnesses, and after weighing the various other factors in the evidence, the jury believes the one witness.

In weighing the testimony of witnesses it is proper for you to consider those factors of human nature which, either with or without any wrongful intention, may obstruct the giving of perfectly true testimony. Those factors are suggested by these

questions: Did the witnesses have a full opportunity to learn the truth? If so, did the witness have the intelligence and purpose to ascertain the facts? What was the advantage or disadvantage from the point of observation? Does the evidence show that the witness had a motive for favoring or an inclination to favor any party? Was he or she, in other words, a biased or an impartial witness? What degree of intelligence, what quality of memory, and what grade of moral purpose, so far as concerns this case, were revealed by the witness' appearance, manner of testifying, and all the other evidence in the case? Is there any timidity or physical handicap, lack of ability in self-expression, or other conditions that place a witness at a disadvantage or might cause his or her testimony to appear on the surface as being less trustworthy than it really was? Was the witness, without fault of his own, confused or embarrassed and thus placed in a light not truly representative?

Should you consider any of these questions, either in your own private reasoning or in open discussion after the case is finally submitted to you, you must look for an answer only to the evidence admitted in the trial of this case.

Any evidence that has been received of an act, omission or declaration of a party which is unfavorable to his own interest should be considered and weighed by you like any other admitted evidence, but evidence of the oral admission of a party other than his own testimony in this trial ought to be viewed by you with caution.

From time to time counsel for one or the other of the parties in the case has interposed objections to questions or to the admission of evidence. Counsel not only have the right, but they have a duty, to make any and all objections which are deemed advisable or appropriate by them, and no inference or presumption can or should be indulged in one way or the other by reason of the interposition of any objection on behalf of any counsel.

At times throughout the trial the Court has been called upon to pass upon the question whether or not certain offered evidence might or might not be properly admitted. You are not to be concerned with the reasons for any rulings which might have been made, nor to draw any inference from those rulings. Whether offered evidence is admissible or not is purely a question of law. In admitting evidence to which an objection might have been made, the Court does not determine what weight should be given to that evidence, nor does it pass on the credibility of the witnesses. As to any offer of evidence that might be rejected by the Court, of course you must not consider that evidence. As to any question to which an objection might have been sustained, you must not conjecture as to what the answer might have been or the reason for the objection.

The law does not require the defendants to prove their innocence which, in many cases, might be impossible, but the contrary the law requires the prosecution to establish beyond a reasonable doubt and by legal evidence the guilt of any person

charged. And if the Government fails to so prove, you should find the accused persons not guilty.

You must not allow yourselves to be led to convict the accused in this case in order to satisfy a fear that some offense may go unavenged or unpunished, or for the purpose of deterring others from the commission of like offenses. No such argument or reason can be weighty enough to justify you in laying aside that just and humane rule of law which requires you to acquit an accused person unless every fact necessary to establish his guilt is proved to you beyond a reasonable doubt and to a moral certainty.

The rule concerning circumstantial evidence does not permit you as jurors to indulge in speculation or surmise, conjecture or guesswork, in order to supply any element of any offense alleged by a prosecuting witness or charged by the Government in this case to have taken place where proof of such element does not appear beyond a reasonable doubt and to a moral certainty. Speculation, surmise, conjecture or guesswork can never be substituted in lieu of proof to justify conviction of an accused person.

Suspicion is not evidence. Mere suspicion, however strong, is not sufficient to establish any fact whatsoever necessary to constitute the crime charged. Mere probabilities are not sufficient to warrant a conviction, nor is it sufficient that the greater weight or preponderance of evidence support the allegations of the indictment. Nor is it sufficient that upon the doctrine of chance it is

more probable that the accused might be guilty than innocent. The accused persons must be proven guilty so clearly that there is no reasonable theory upon which they can be said to be innocent, or he, individually, when all of the evidence is considered together. Mere opportunity of an accused person to commit a crime charged is insufficient to justify a verdict. In every criminal case the proof must substantially correspondent to the material allegations of the indictment which has been read to you.

By the arrest of the defendants or by the return of the indictment, no presumption whatsoever arises to indicate that a defendant is guilty or that he had any connection with or responsibility for the acts charged against him. A defendant is presumed to be innocent at all stages of the proceeding until the evidence introduced on behalf of the Government shows him to be guilty beyond a reasonable doubt. And this rule applies to every material element of the offense charged. There is only one offense charged here, a conspiracy. Mere suspicion, as I have indicated, will not authorize a conviction, and a reasonable doubt is such as you may have in your minds when, after fairly and impartially considering all the evidence, you do not feel satisfied to a moral certainty of the defendant's guilt.

In order that the evidence submitted shall afford proof beyond a reasonable doubt, it must be such as you would be willing to act upon in the most important and vital matters relating to your own affairs. Reasonable doubt is not a mere possible or imaginary doubt, nor is it a bare conjecture, for

it is difficult to prove anything to an absolute certainty. You are to consider the strong probabilities of the case, and a conviction is justified only when such probabilities exclude all reasonable doubt, as the same has been defined to you.

Without it being restated or repeated, either now in this part of the instructions or subsequently, you are to understand that the requirement that a defendant's guilt be shown to be beyond a reasonable doubt is to be considered with and accompanying each and every instruction.

In judging of the evidence you are to give it a reasonable and a fair construction, and you are not authorized, as I have indicated, because of any feeling of sympathy or bias to apply a strained construction, one that is unreasonable, in order to justify a certain verdict or conclusion when, were it not for such feeling or bias, you would reach a contrary conclusion. And whenever, after a careful consideration of all of the evidence, your minds are in that state where a conclusion of innocence is indicated equally with a conclusion of guilt, or there is reasonable doubt in your minds as to whether or not the evidence is so balanced, the conclusion of innocence upon such occasion must be adopted.

You are the sole judges of the credibility and the weight which is to be given to the different witnesses who have been called to testify in this trial and of the documentary evidence which has been introduced. A witness is presumed to speak the truth. This presumption, however, may be repelled

by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty and integrity, or by his motives, or by contradictory evidence. In judging the credibility of the witnesses who have been called, you may believe the whole or any part of the evidence of any witness, or you may disbelieve the whole or any part of it, as may be dictated by your judgment as reasonable men and women.

You should carefully scrutinize the testimony given, and in so doing consider all the circumstances under which the witness testified, his demeanor while on the stand, his intelligence and the other things which I have outlined to you, as well as the relationship which the witness might bear to the Government or to any of the defendants, the manner in which a witness might be affected by the verdict, and the extent to which a witness might be contradicted or corroborated by other evidence, if at all, and every matter which tends reasonably to shed light upon his testimony and his credibility.

If a witness is shown knowingly to have testified falsely on a trial touching any material matter you should distrust his testimony in other particulars, and in that case you are at liberty to disregard and reject the whole of that witness' testimony.

All but one of the defendants have offered themselves as witnesses in this case. As to the one defendant who did not testify, you are not to draw any inference or presumption concerning the fact that he did not take the stand. As to those who did take

the stand, you are to estimate and determine the credibility of the defendant as a witness in the same manner that you would consider the testimony of any other witness, and it is proper to consider all the matters that have been suggested to you in that connection, including the interest which the defendant has in his own case, his own hopes and his fears, and what he might have to gain or lose as a result of your verdict.

You are not limited in your consideration of the evidence to the bald expression of any witness. You are authorized, as I have indicated, to draw such inferences as I have defined an inference from the facts and circumstances which might be proved, as seem justified in the light of your experience as reasonable men and women.

The mere fact that a witness might have been connected with the United States Government in any capacity whatsoever does not mean that the testimony of such witness is entitled to any greater weight or credence by that fact alone. You will consider the testimony of any officer or employee of the United States Government the same as you would consider the testimony of such person if he were not so employed.

The indictment in this case, as in every indictment in every case, is merely the method provided by the law whereby the United States, through a grand jury and on behalf of the people, shall charge one or more parties with a violation of the law, and whereby the party or parties accused shall be advised of the charge or charges so that such party or parties may defend against such charge.

As I have indicated, the mere fact that an indictment has been returned gives rise to no inference that the accused are guilty. The establishment of guilt is a matter of proof.

The law under which these proceedings are brought is commonly called the Sherman Antitrust Act. The pertinent provisions of that law are as follows (reading from Section 1, Title 15, U. S. Code):

“Every combination or conspiracy in restraint of trade or commerce among the several states or with foreign nations is hereby declared to be illegal; * * * Every person who shall engage in any combination or conspiracy declared to be illegal shall be deemed guilty of a misdemeanor * * *”

The law provides an appropriate punishment, but you are not to be concerned with the punishment or to take it into consideration at all in your deliberations as that is a matter which is the exclusive responsibility of the judge in the event of a conviction.

You are not to be concerned with the reason for the law, or whether you regard it as a good or bad law. It was passed by that branch of the Government charged with the responsibility of making laws. It is constitutional and is the law of the land, and you must accept it as such.

The indictment, which was outlined at length at the beginning of the trial by Government counsel, and also in later argument, charges, in brief, that

some time prior to May 1946 the defendants charged in a combination and conspiracy in Southern California to "fix, establish and maintain arbitrary, artificial and non-competitive prices for the sale to dealers of fresh fish and crustaceans caught in the waters of the Pacific Ocean, both territorial and foreign off the coast of California, from Morro Bay south to and including the territorial waters off the west coast of Mexico, and to prevent dealers who did not agree to pay said prices from obtaining, selling or shipping any fresh fish or crustaceans, all in violation of the above-entitled Sherman Act." The indictment of course goes into much more detail, but the foregoing is the essence of the charge to which you must respond with a verdict of either guilty or not guilty as to these defendants. You may have the indictment in the jury room if you wish so that you may see all of its terms.

The indictment thus charges the defendants with having engaged in a conspiracy in restraint of trade, in violation of the Sherman Act. A conspiracy may, in general, be defined as a combination or agreement among two or more persons to accomplish an unlawful purpose or act, or to perform a lawful act by unlawful means. To establish such a conspiracy, it is sufficient if two or more persons in any manner or through any contrivance expressly or tacitly, whether orally or in writing, and whether openly or secretly, come to a mutual understanding to accomplish a common and unlawful purpose.

The law does not require the Government to put its finger on the precise manner or method in which

a combination or conspiracy or an unlawful agreement contrary to the Sherman Act was knowingly entered into because in many cases it would be impossible for the Government to produce such proof in detail.

One who participates in a conspiracy and with knowledge of the conspiracy is guilty, even though he is absent when the criminal or unlawful act which is the object of the conspiracy is committed. His knowledge of the scope of the conspiracy may be limited and he need not know all the details of the plan or all of the operation of the conspiracy to be guilty.

A person who joins an existing conspiracy is liable for all the acts of the conspirators committed before he joined the conspiracy if he joined with knowledge of the conspiracy. Such a person is also bound by the acts of the other co-conspirators after he joins the conspiracy. His joining the conspiracy does not create a new conspiracy, and does not change the status of the other conspirators. The new member is as guilty as though he had been an original conspirator.

The success or failure of a combination or conspiracy is immaterial as the crime under the Sherman Act is the act of conspiring itself, and no overt act in furtherance of the conspiracy need be proved.

It is only necessary that the Government prove that the conspiracy charged in the indictment existed some time during the period of three years before the date of the return of the indictment, or, in this case, at any time within three years prior to August

23, 1946. The guilt of any defendant who you may find participated in such a conspiracy was fixed beyond repentance once you find there was a conspiracy and that such defendant or defendants participated therein. A withdrawal from the conspiracy by a defendant, or the subsequent dissolution or abandonment of the conspiracy, if you find that there was a dissolution or abandonment thereof, would not relieve from criminal responsibility any defendant who you may find participated in the conspiracy charged in the indictment at any time during said 3-year period.

It is sufficient if there is a concert of action, all of the parties working together understandingly, with a single design and for the accomplishment of a common purpose. It is not necessary that each conspirator have knowledge of all the details of the conspiracy, or the means to be used; nor is it necessary that the conspirators should meet together, in order to constitute an unlawful combination. If they have a mutual understanding, and act through one or more individuals as a consequence of such mutual understanding, the conspiracy is complete.

It is not necessary that the Government prove each and every allegation of the indictment, or that the Government prove that the defendants sought to attain every object alleged in the indictment to have been part of the conspiracy. Nor is it necessary that the Government prove that the defendants performed each and every act alleged in the indictment by which the conspiracy is alleged to have been

effectuated. If the Government proves beyond a reasonable doubt that the defendants or any two or more of them combined and conspired to restrain interstate or foreign trade and commerce in fresh fish, as alleged in paragraph 12 of the indictment (which was the paragraph I paraphrased to you a while ago), any defendants who you may find were members of or participants in such a conspiracy would be guilty as charged in the indictment.

In this case the defendants are accused of entering into an unlawful combination and conspiracy. The word "conspiracy" is not to be understood by you as meaning anything more than an alleged "combination" as alleged in the indictment. I mention this so that you will not attach any undue meaning to the word "conspiracy" and, further, that it is only intended to mean that the defendants are accused of agreeing among themselves to do the things set forth in the indictment.

Under our laws, each of the defendants is presumed to be innocent of any crime, and particularly the alleged crime set forth in the indictment which has been read to you. This indictment is not evidence of the commission of any wrong or crime, nor is it intended to convey to you that the defendants have committed any wrong or crime; it is simply the method used in bringing people to trial when they are accused of crime.

This presumption of innocence also applies to each defendant, independent of the other defendants, which means that the presumption of innocence applies equally to each of them.

In this case the defendants are not required to prove their innocence. The Government has the complete burden of proving each defendant, independent of the other defendants, guilty beyond a reasonable doubt. Therefore every material allegation of the indictment must be proved to your satisfaction, beyond a reasonable doubt as to each defendant, before you would be justified in finding that particular defendant guilty.

In considering the evidence in this case as to each defendant, if you are unable to reach a point in your minds which convinces you beyond all reasonable doubt and to a moral certainty that a particular defendant, or all defendants, are guilty, then it is your duty to find such defendant or defendants not guilty.

Any alleged or proved restraint by one or more of the defendants with the business of any so-called individual fish dealer or dealers mentioned in this case is not the controlling factor to be considered by you in arriving at your verdict in this case. The Government must prove a conspiracy to restrain in a substantial way the charge made in the indictment.

The term "fishermen" as used in the indictment refers to an individual or group of individuals who own, lease or operate a particular boat for the purpose of engaging, on their own account, in the business of catching fresh fish and crustaceans in the fishing area defined in the indictment and bringing them to fishing ports for the purpose of sale to dealers. Paragraph 11 of the indictment alleges

that fishermen who are members of the defendant Local 36, IFAWA, are not employees, workers or laborers who receive a salary or wage for their work or labor, but are independent businessmen engaged in business on their own account and who operate fishing boats for their own account and profit.

The indictment further alleges that no employer-employee relationship exists between the fishermen members of the defendant Local 36 and the dealers to whom their catch is sold, and that the fishermen members of the defendant Local 36 sell their catch directly to dealers and do not act collectively through the defendant Local 36 in catching, producing, preparing for market, processing and handling their catch.

If you find as a fact that the fishermen members of defendant Local 36 are independent businessmen who are engaged in the business of catching and selling fish to dealers on and for their own account and profit, and that they sell their catch directly to buyers, then I charge you as a matter of law that a conspiracy or combination as alleged in the indictment of any such fishermen for the purpose of fixing, establishing and maintaining the price at which they shall individually sell their fish, and to prevent the buyers of fish who refuse to pay the price so agreed upon among the fishermen members of defendant Local 36 from obtaining fish from sources other than the members of defendant Association constitutes a violation of the law, and that any and all individual defendants herein who you find have been members of or participated in such

combination or conspiracy for the aforesaid purposes would be in violation of law as charged in the indictment.

If you find that the fishermen members of defendant association are in fact businessmen as charged in the indictment and that the defendants have in fact combined and conspired among themselves to fix the price at which the individual members sell their fish to the dealers, then it is immaterial whether the price so fixed by agreement among the defendants is reasonable or unreasonable.

Price-fixing includes more than the mere establishment of uniform prices. Prices are fixed within the meaning of these instructions if the prices to be charged by the individual fishermen members of defendant Local 36 are to be at a certain level; or on ascending or descending scales, or if they are to be uniform, or if by various formulae they are to be stabilized. Price-fixing also includes placing a floor under the market, a floor which may serve the function of increasing the stability and firmness of market prices, and which may prevent the determination of those prices by free competition alone.

The Fish Marketing Act, which has been referred to during the trial of this case, reads in its material portions as follows:

“Persons engaged in the fishery industry, as fishermen, catching, collecting, or cultivating aquatic products, or as planters of aquatic products on public or private beds, may act together in associations, corporate or otherwise,

with or without capital stock, in collectively catching, producing, preparing for market, processing, handling, and marketing in interstate and foreign commerce, such products of said persons so engaged.

“The term ‘aquatic products’ includes all commercial products of aquatic life in both fresh and salt water, as carried on in the several states, the District of Columbia, the several Territories of the United States, the insular possessions, or other places under the jurisdiction of the United States.

“Such associations may have marketing agencies in common, and such associations and their members may make the necessary contracts and agreements to effect such purpose: Provided, however, That such associations are operated for the mutual benefit of the members thereof, and conform to one or both of the following requirements:

“First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein; or

“Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

“and in any case to the following:

“Third. That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members.”

As a matter of law, persons engaged in the business of catching fish for sale and profit may act together in an association in collectively catching, producing, preparing for market, processing, handling and marketing of the fish caught by their members. When formed for such purposes, such an association may, on behalf of its members, enter into a contract with a buyer of fish which provides for and fixes the price at which the association itself or as sales agent for its members sells on behalf of its members the fish caught or to be caught by the members of the association to a buyer. Such contracts must, however, be arrived at by free and voluntary negotiations between the parties thereto. I charge you that if you find as a fact that the defendant association is the type of association before described, any such contracts must be separately and voluntarily entered into and negotiated by and between the association and the buyers of fish, and that neither said association nor its members can force any buyer of fish to enter into such a contract by practices and tactics which are not free and voluntary. Such a contract entered into between the defendant association and a buyer or buyers of fish under the latter circumstances would be one in which the price was fixed by one party to the contract and the price would therefore be arbitrary, artificial and non-competitive, and such a contract would be illegal and in restraint of trade.

Evidence has been admitted in the case of picketing and boycotting. These acts in and of themselves are not contrary to or in violation of any law. They

are to be considered by you as evidence in your determination as to whether the defendants did or did not combine or conspire as alleged in the indictment. If you find that the defendants did not so combine or conspire, then you should acquit the defendants.

Section 6 of the Clayton Act was read to you by one of counsel. I will read it again.

“The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.”

In connection with this phase of the matter, it is immaterial whether or not a defendant or any other member of Local 36 owned and operated his own boat or fished for a share of the lay. The matter of whether or not the defendants come under Section 6 of the Clayton Act is to be determined by the relationship of the defendants and members of Local 36 to the fish dealers and not to one another or to any other person.

Further in that connection the indictment charges that the defendant association Local 36, IFAWA, is in fact an association of independent businessmen engaged in the business of catching and selling fish for their own account and profit and that the members of Local 36 are not employees of the fish dealers. The fact that said defendant association may refer to, act as, or call itself a labor union does not in and of itself make said association a labor union. An association of independent producers or of persons who are self-employed and who are engaged in business on and for their own account and profit, free from such controls as an employer ordinarily exercises over a person who is an employee, would not be a labor union.

If you find as a fact that the membership of defendant Local 36, IFAWA, consists of persons who stand in the relationship of employees to the fish dealers, I charge you that the members of said association may join together and carry on acts to effect changes in the terms and conditions of their employment, even though their acts may affect or obstruct interstate or foreign commerce and that in doing so they would be pursuing a legitimate objective. They may, however, perform acts which affect or obstruct interstate or foreign commerce as a matter of law only if there is a labor dispute between the members of Local 36 and the parties against whom their acts are directed or intended to affect, in this case the fish dealers. Such a labor dispute, however, must affect the terms and conditions of employment of the members of Local 36 or the terms and conditions of their employment must

be the matrix of any controversy or dispute you may find as a fact existed between the members of defendant association and the fish dealers.

If you find that there is a controversy between the members of Local 36 and the fish dealers and that controversy is solely one over the price or terms and conditions at which the members of Local 36 shall sell their fish, and that such a controversy does not involve or affect an employer-employee relationship or is not the matrix of the controversy, then no labor dispute can be said to exist between the member of Local 36 and the fish dealers which would entitle the members of Local 36 to combine together to restrain foreign and interstate trade and commerce in fresh fish as charged in the indictment, under Section 6 of the Clayton Act.

An officer of an unincorporated association is not authorized merely by virtue of his office to make the association a party to an unlawful conspiracy. In order to bind the defendant association by the act of a representative or officer thereof, it is necessary for you to find that the defendant association authorized or ratified the act. You are accordingly instructed as a matter of law that the defendant association cannot be found guilty in this case for an unlawful act or acts, if any, of individual officers, members, or agents unless you find such clear proof from the evidence that the defendant association actually participated in or actually authorized such unlawful act or acts, if any, or ratified such act or acts, if any, after actual knowledge thereof.

No individual defendant who is an officer or member of the defendant association can be found guilty for an unlawful act or acts, if any, of other officers, members, or agents of such association except upon clear proof from the evidence that such individual defendant actually participated in or actually authorized such an act or acts or ratified such unlawful act or acts, if any, after actual knowledge thereof.

You are instructed that the elimination of so-called "competitive evils" in an industry is not a legal justification for price-fixing contracts otherwise illegal. Ruinous competition, financial disaster, and evils of price-cutting are not available to justify the action or conduct of persons engaged in an unlawful combination to fix and determine in an arbitrary manner prices of commodities sold in an interstate market. Genuine or fancied competitive abuses are no legal justification for illegal price-fixing combinations or conspiracies, and the good intentions of the members of any such illegal combination are likewise immaterial.

You are instructed that it is no defense to those on trial that others not on trial, or not indicted, appear from the evidence to be implicated in the conspiracy alleged in the indictment, or to be themselves guilty of some other illegal combination or conspiracy. You are to consider the guilt or innocence of those on trial without regard to the culpability of others who are not on trial.

There is nothing peculiarly different in the way a jury is to consider the proof in a criminal case from that by which men give their attention to any

question depending upon evidence presented to them. You are expected to use your good sense, consider the evidence for the purpose only for which it has been admitted, and in the light of your knowledge of the natural tendencies and propensities of human beings, resolve the facts according to deliberate and cautious judgment; and while remembering that the defendant is entitled to any reasonable doubt that may remain in your minds, remember as well that if no such doubt remains the Government is entitled to a verdict. For to the jury exclusively belongs the duty of determining the facts.

You are instructed that if the judge has said or done anything throughout the trial or in these instructions which has suggested to you that he is inclined to favor the claims or position of either party, you will not suffer yourselves to be influenced by any such suggestion. I have not expressed, nor intended to express, nor have I intimated or intended to intimate, any opinion as to what witnesses are or are not worthy of credence, what facts are or are not established, or what inferences should be drawn or should not be drawn from the evidence adduced. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you now to disregard it.

You should not consider as evidence any statement of counsel made during the trial or argument unless such statement was made as an admission or stipulation conceding the existence of a fact or facts. You must not consider for any purpose any evidence offered and rejected, or which has been

stricken out by the Court. Such evidence is to be treated as though you had never heard it. You are to decide this case solely upon the evidence that has been admitted by the Court and the inferences that you may reasonably draw therefrom and such presumptions as the law may deduce therefrom, as given in these instructions.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to your individual judgment. To each of you I would say that you must decide the case for yourself, but you do so only after a consideration of the case with your fellow-jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, none of you should vote either way, nor be influenced in so voting, for the single reason that a majority of the jurors are in favor of such party. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors.

Remember that you are not partisans or advocates in this matter, now you are judges. The final test of the quality of your service will lie in the verdict which you return to this courtroom and not in the opinions which any of you may hold as you retire. Have in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict in this case, and to that end the Court would remind you that

in your deliberations in the jury room there can be no triumph excepting the ascertainment and declaration of the truth.

After the bailiffs have been sworn you will retire to the jury room. The indictment and the exhibits I have heretofore indicated will be sent to the jury room by the bailiff for you to examine if you desire. When you have agreed upon a verdict you will fill in the verdict accordingly, indicating your conclusion as to the various defendants, and the foreman will sign the verdict. You will elect a foreman as soon as you retire to the jury room. Upon reaching a unanimous conclusion as to each of the defendants as to whether they are guilty or not guilty, each of you will return to your places in the courtroom.

The Clerk will swear the bailiffs.

(Whereupon the clerk swore the bailiffs to take charge of the jury.)

The Court: Mr Hunter is excused. You may step down. You are permanently excused.

The Clerk will hand the bailiff the exhibits and the indictment. The parties have heretofore indicated their objections to the instructions which have been noted of record. You may retire.

(The jury retired from the courtroom at 5:30 o'clock p.m.)

* * *

(The jury returned to the courtroom at 9:45 o'clock p.m.)

The Bailiff: Ladies and gentlemen of the jury, have you arrived at a verdict?

The Foreman: We have, your Honor.

The Court: The foreman will hand the verdict to the bailiff.

The Clerk will read the verdict.

The Clerk: "United States of America, Plaintiff v. Local 36 of International Fishermen & Allied Workers of America, Jeff Kibre, Gilbert Zafaran, Clifford C. Kennison, F. R. Smith, George Knowlton, Otis W. Sawyer, W. B. McComas, Harry A. McKittrick, Arthur D. Hill, C. Lloyd Munson, Charles McLauchlan, Robert M. Phelps, Burt D. Lackyard and Ray J. Morkowski, Defendants; No. 18842, Criminal. Verdict.

"We, the jury in the above-entitled case, find the defendant, Local 36 of International Fishermen & Allied Workers of America, guilty as charged in the indictment;

"find the defendant Jeff Kibre guilty as charged in the indictment;

"find the defendant Gilbert Zafran guilty as charged in the indictment;

"find the defendant Clifford C. Kennison guilty as charged in the indictment;

"find the defendant F. R. Smith guilty as charged in the indictment;

"find the defendant George Knowlton guilty as charged in the indictment;

“find the defendant Otis W. Sawyer guilty as charged in the indictment;

“find the defendant W. B. McComas guilty as charged in the indictment;

“find the defendant Harry A. McKittrick guilty as charged in the indictment;

“find the defendant Arthur D. Hill guilty as charged in the indictment;

“find the defendant C. Lloyd Munson guilty as charged in the indictment;

“find the defendant Charles McLauchlan guilty as charged in the indictment;

“find the defendant Robert M. Phelps guilty as charged in the indictment;

“find the defendant Burt D. Lackyard guilty as charged in the indictment;

“and find the defendant Ray J. Morkowski guilty as charged in the indictment;”

The Court: The Clerk will poll the jury. Do you wish each polled as to each defendant or will one polling be sufficient?

Mr. Margolis: One will be sufficient.

The Court: As your name is called, you will answer yes or no whether or not the verdict as read by the Clerk is your verdict.

The Clerk: Clayton Preston Strain?

Juror Strain: Yes.

The Clerk: Anne Irma Pettit?

Juror Pettit: Yes.

The Clerk: Agnes Brown?

Juror Brown: Yes.

The Clerk: Royal Edward Secord?

Juror Secord: Yes.

The Clerk: George Tadashi Shimizu?

Juror Shimizu: Yes.

The Clerk: Harold Sheldon Kinney?

Juror Kinney: Yes.

The Clerk: Glen Moore?

Juror Moore: Yes.

The Clerk: Frank Edward Miller?

Juror Miller: Yes.

The Clerk: Arthur Lincoln Line?

Juror Line: Yes.

The Clerk: Julia Firestone Whyte?

Juror Whyte: Yes.

The Clerk: Arthur Sherman Patrick?

Juror Patrick: Yes.

The Clerk: James Wark?

Juror Wark: Yes.

The Court: Very well. The clerk will record the verdict.

Ladies and gentlemen, that concludes your services in this matter. I am sure everyone in the courtroom expresses to you a debt of gratitude for the time that you have spent, whether they agree with your verdict or not. I think you may be excused until further notice. It is my intention to suggest to the senior judge that you be excused for the remainder of the term because you have now spent I think something like 24 days of actual trial work on this trial stretched over a period of almost eight weeks.

(The jury retired from the courtroom at 9:50 o'clock p.m.)

The Court: By the way, may the record show that all the defendants were present in person except the defendant Otis Sawyer, who was excused by the Court during the recess.

Mr. Margolis: I think that is correct, your Honor.

The Court: Very well. On the matter of sentence, what is your pleasure in that respect?

Mr. Margolis: If your Honor please, it is our intention to make a motion for a new trial, and at this time we ask that bail be continued on the defendants, their present bail.

The Court: The present bail will be continued on the defendants.

The new rules of criminal procedure require that in all criminal matters the matter of sentence shall be referred to the Probation Office for presentence investigation and report unless for good reason the contrary is shown.

Mr. Dixon: That is agreeable with us.

The Court: This is not ordinarily the type of case involving moral turpitude. What is your suggestion concerning the matter of sentence?

Mr. Dixon: It is entirely agreeable with the Government, your Honor, that the matter be referred as suggested to the Probation Department for the reports to be made available to the Court, and at the time the matter comes up for sentence the Government will at that time be prepared to make its recommendations for whatever consideration the Court may care to give them at the time in passing sentence.

The Court: It is not a matter of request of the defendants, so the defendants will lose no possible rights by the reference because, contrary to the practice in the Superior Court, the request need not be made in the Federal Court for reference to the Probation Department.

This is May 7. The record is long and I suppose that the defendants will probably need some time in the matter of preparing a motion for a new trial. I think May 26 would be sufficient. That would be three weeks from last Monday.

Mr. Margolis: That will be entirely satisfactory, your Honor.

The Court: May 26th at 2:00 o'clock. All further proceedings in this case against all the defendants are continued to the hour of 2:00 o'clock p.m. on May 26th, and each and all of the defendants are ordered and directed to return to this courtroom at that hour. In the meantime they may be released on their present bail.

The Court: The order continuing this matter until May 26th will be vacated, and the order instead will be to continue all matters and further proceedings in this case until May 21st at the hour of 2:00 o'clock p.m. of that day, and all defendants are ordered and directed to return at that date and hour.

Mr. Rubin: May the record also show, if your Honor please, that the defendants may withdraw those exhibits consisting of the membership application cards of all the units?

The Court: Whatever numbers they are, let us put them in the record.

Mr. Rubin: I do not believe all of the exhibits are here.

The Court: The defendants, by stipulation, may withdraw Exhibits 43, 44, 45, 42, 42-B, 42-A, 45-A.

Mr. Rubin: And may the record also show, if your Honor please, that the ledger of books and the membership application cards for the Newport unit and the Santa Monica-Redondo unit have already been withdrawn by the defendants. The numbers of all the exhibits are covered by written stipulation on file in the record.

The Court: Very well.

(Whereupon, at 10:00 o'clock p.m., the court was adjourned.)

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 8th day of May, A.D., 1947.

.....

Official Reporter.

MOTION TO DISMISS INDICTMENT AND
OF CHALLENGE TO AND MOTION TO
STRIKE OUT THE ENTIRE TRIAL JURY
PANEL

* * *

No. 18842, Criminal; United States v. Local 36 of International Fishermen & Allied Workers, et al. Hearing on motion of the defendants to dismiss the indictment and of challenge to and motion to strike out the entire trial jury panel pursuant to notice thereof filed February 11, 1947.

* * *

Mr. Margolis: The defendants are ready.

The Court: Are the defendants present in person?

Mr. Margolis: I believe all of them with one exception, your Honor. I didn't have an opportunity to check them at the last moment.

The Court: The Clerk will call the roll. While the defendants have filed a waiver, the order of the Court will be that it is necessary for them to attend throughout these proceedings.

The Clerk: Jeff Kibre.

The Defendant Kibre: Present.

The Clerk: Gilbert Zafran.

The Defendant Zafran: Here.

The Clerk: Clifford C. Kennison.

The Defendant Kennison: Here. [5*]

The Clerk: F. R. Smith.

The Defendant Smith: Here.

The Clerk: George Knowlton.

The Defendant Knowlton: Here.

The Clerk: Otis W. Sawyer. (No response)

The Clerk: W. B. McComas.

The Defendant McComas: Here.

The Clerk: Harry A. McKittrick.

The Defendant McKittrick: Here.

The Clerk: Arthur D. Hill.

The Defendant Hill: Here.

The Clerk: C. Lloyd Munson.

The Defendant Munson: Here.

The Clerk: Charles McLauchlan.

The Defendant McLauchlan: Here.

The Clerk: Robert M. Phelps.

The Defendant Phelps: Here.

The Clerk: Burt D. Lackyard.

The Defendant Lackyard: Here.

The Clerk: Floyd Sherman.

The Defendant Sherman: Here.

The Clerk: Ray J. Morkowski.

The Defendant Morkowski: Here.

The Clerk: All present except one, your Honor, Otis W. Sawyer. [6]

Mr. Margolis: Your Honor please, with regard to Mr. Sawyer, we understand that he had some domestic difficulties and we have tried to locate him and have been unable to locate him. We have information that he is out of the state but we don't know where. We have done everything possible that we could but we can't locate him.

The Court: Is he on bond?

Mr. Margolis: He is on bond, your Honor.

The Clerk: \$500 bond.

The Court: The bond will be ordered forfeited and a bench warrant will be issued for Mr. Sawyer.

The Clerk: Fixing bond in what amount, your Honor.

Mr. Margolis: I would like to state that we will continue our efforts, of course, to locate him. His wife doesn't know where he is.

The Court: Maybe the Antitrust Division and the FBI and the Marshal's Office will aid you from now on.

Mr. Rubin: We will be glad to cooperate.

The Court: The bond on the bench warrant will be \$2500.

The matter is called for trial this morning. The Clerk indicated that it was on a motion to dismiss.

The Clerk: There is also a motion to dismiss as well as the trial, your Honor.

The Court: Let me see the file.

(The document referred to was passed to the Court.) [7]

Mr. Margolis: Before proceeding, your Honor, may I move the association of Robert W. Kenny and the firm of Kenny and Cohn as associate counsel for all of the defendants except the one defendant represented by Mr. Garrett.

The Court: So ordered.

Mr. Garrett is representing Mr. Sherman?

Mr. Garrett. That is right.

The Clerk: Floyd Sherman is represented by Mr. Garrett.

The Court: Is Floyd Sherman here?

Mr. Garrett: He is present, your Honor.

The Court: Very well.

The Clerk: May I have the appearances for the Government?

Mr. Dixon: William C. Dixon, Special Assistant to the Attorney General.

The Court: James M. Carter by Howard V. Calverley?

Mr. Calverley: Yes, your Honor, appearing on the motion to dismiss and the motion to strike out the jury panel.

Mr. Rubin: Robert J. Rubin, Special Assistant to the Attorney General.

Mr. Schwartz: Benjamin F. Schwartz, Special Attorney, Antitrust Division.

Mr. O'Malley: Jesse R. O'Malley, Special Attorney, Antitrust Division.

The Court: Proceed.

Mr. Margolis: Your Honor please, at this time we would [8] like to move for the exclusion of the prospective jurors curing the presentation of the motion to dismiss and the challenge to the jury panel.

The Court: You have two motions, one to dismiss the indictment on the ground that the grand jury which returned the indictment was selected in a manner contrary to the laws announced most recently and currently by the Supreme Court; and the other is a challenge to the talesmen on the trial

jury, which is subsequent and separate panel. Is that correct, you have two motions?

Mr. Margolis: That is correct. However, the method of selecting the grand jurors and the trial jurors is such that the two motions, as far as proof is concerned, are interwoven. There can be no separation as far as proof is concerned because both the grand jury and the trial jurors were selected in the same manner, as I understand it, and from the same source.

The Court: I am a little puzzled as to procedure. Since the receipt of the motions I have been reading the cases and the law in connection with it. I do not think that I can go quite as far in connection with this matter as Justice Roberts did when he dissented in the *Mahnich v. Southern Steamship* case, 321 U. S. 96, when he said: "If litigants and lower Federal courts are not to (follow and apply the law as clearly announced) the law becomes not a chart to govern conduct [9] but a game of chance; instead of settling rights and liabilities (and duties), it unsettles them."

I cannot find in the law any guide or method of procedure. The Federal Rules of Criminal Procedure, which have been adopted since the decision of the Supreme Court in the case of *Mahnich v. Southern Steamship*, give me no indication there. So it would seem to me, and the thing that puzzles me and perhaps counsel on one side or the other can aid me in connection with it—it would seem to me that your challenge to the trial jury could not be made until you had 12 men in the box and until

they had been examined for cause, because the constitutional command is that it shall be an impartial jury. I may be in error on that. I would like to have some suggestions from the counsel, if anybody has any.

Mr. Margolis: I may say this, your Honor. In the Thiel case the trial jury which was finally obtained actually had on it five of the classes, within those classes of persons which were excluded from the panel. The Court in that case held that it wasn't a question as to whether or not an impartial jury had been obtained, but whether the panel from which the jurors were drawn was obtained in an impartial manner, in such a manner as to constitute a fair representative cross-section of the community or utilizing a system designed to achieve that kind of a result.

I think that the question that is presented at this time [10] is not whether the trial jury that can be or might be obtained from the panel is a fair trial jury or a proper trial jury or it is a constitutional trial jury, because I believe under the Thiel case that is immaterial as far as this particular motion is concerned, the question is whether the panel—

The Court: You mean it is immaterial whether your jury is actually impartial?

Mr. Margolis: As far as this question is concerned, yes, your Honor. I would say that that is so, as far as the Thiel case is concerned, because in the Thiel case, as I say, there were five persons on the final jury, or on the jury panel from the excluded class, but it didn't make any difference be-

cause it was held in that case that the method of selection of the jurors for service on the jury panel was improper and that that was the error, that was the wrong against which the motion was directed.

The Court: In that case the wrong consisted of excluding men who worked by the day, although there were five wives of men who worked by the day on the jury. They said it was an exclusion of an economic class.

The logical extension of that is that the husbands who work by the day are in a different economic class than their wives. Now where do you draw the line unless you seek an impartial jury, and how do you know until you get the jury in the box but what you have men who might today not be long-shoremen or laborers or work by the day but who maybe last week or last month were?

Mr. Margolis: I would like first of all to renew my motion at this time for the exclusion of the jury panel pending discussion.

The Court: Do you have any observations on the Government's side as to the method to proceed?

Mr. Calverley: No, your Honor. The effect of the Thiel decision, as I read it, is very much as counsel has stated it here. In fact, that was the criticism directed against the majority opinion by the minority. It was directed along those lines, namely, to the effect that it was more or less an academic question since the jury was composed of five persons of the same general economic class as the appellant in this case. But nonetheless in spite of that fact it was reversed by a majority of the court.

The Court: How much time will you want?

Mr. Margolis: You mean how long will this matter take?

The Court: Yes.

Mr. Margolis: I would estimate, as far as our presentation is concerned, about two or three hours.

The Court: How do you propose to proceed, by affidavit?

Mr. Margolis: No, I propose to offer testimony, your Honor.

The Court: Oral testimony? [12]

Mr. Margolis: Yes, your Honor, plus exhibits that have been prepared which will be offered through witnesses on the stand.

The Court: I dislike to just have the jury members of the panel wait around. How many witnesses do you expect to produce?

Mr. Margolis: I expect to produce two or three witnesses. When I speak of two or three hours, your Honor, I am speaking of our case, I am not speaking of how much time the Government will take. I think it would be safe to say, however, your Honor, that it will take all day.

Mr. Dixon: In view of the statement by counsel that he expects this argument to take at least three hours on their part and perhaps——

The Court: Argument? He said evidence. He didn't even get down to the argument.

Mr. Dixon: I would assume, your Honor, that it probably will take the rest of the day to dispose of this matter and accordingly suggest, subject to the Court's approval, that the jury might be dismissed for the day under those circumstances.

The Court: If you have two or three hours of direct testimony, I do not know how long the Government will want to cross-examine, and it is impossible to estimate that—are witnesses subpoenaed on both sides? [13]

Mr. Rubin: Yes.

Mr. Dixon: We have a witness here, Mr. Hansen or Mr. Smith.

The Court: On the trial of the merits?

Mr. Dixon: The Government has several witnesses under subpoena, your Honor.

The Court: I do not think that in view of your statement that you have two or three hours direct testimony, and counsel will want to argue the matter, I suppose—I do not know how long that will take—that rather than have the jury come back tomorrow and perhaps go through the same thing again, as well as the witnesses, that it might be preferable if we put the matter over for a day or two days, or even longer, in order that we could be assured of a disposition of this preliminary phase.

Is there any objection to the exclusion of the panel?

Mr. Dixon: We have no objection, your Honor.

The Court: Very well.

Mr. Kenny: I might interrupt, your Honor. I will also have another motion on which I have prepared about an 82-page memorandum, that while formally it should be heard after the jury has been sworn, I think we might more or less informally hear it also.

The Court: What is the nature of the motion?

Mr. Kenney: It will be a motion to dismiss on the [14] ground that the indictment does not state a public offense.

The Court: On different grounds than suggested here?

Mr. Kenney: Oh, yes. This is on the Sherman Act itself. Of course we made the formal objection to the testimony but we might, for the convenience of the jury, dispose of that during this interim period and it might be convenient to all if that were considered too.

The Court: Well, in order that everybody will not be pressed and crowded for time, I will have the jury come back next Tuesday, February 25, at the hour of 9:45, unless they have need for a jury elsewhere in the meantime.

The Clerk informs me that you are wanted in Judge O'Connor's courtroom forthwith. The jury members of the panel will go from here to Judge O'Connor's courtroom, Courtroom No. 7, at the other end of the building on this same floor.

Do you have any additional affidavits to offer on either side?

Mr. Calverley: If the Court please, the plaintiff wishes to offer the affidavit of Mr. Arvin H. Brown, the jury commissioner for this district, a copy of which has been handed to counsel for the defendants.

The Court: A copy has been served?

Mr. Calverley: A copy has been served, your Honor.

The Court: Very well. That will be received and filed.

Mr. Calverley: Mr. Smith, the Clerk of this court, has [15] an affidavit which we wish to file in this proceedings, and the original of which Mr. Smith has now in the courtroom and will be filed at this time, a copy of which has been left with counsel.

Mr. Margolis: Yes, we received a copy.

The Court: I might say preliminarily, in connection with the motion to dismiss the indictment on the ground that the grand jury was improperly paneled, that were it not for the fact that the rules and standards which must be followed lack considerable clarity by virtue of the decisions of the Supreme Court touching the matter, I feel that I would be not only justified but I would be required in the exercise of what has been referred to as the sound judicial discretion to deny the motion on the ground that it is not timely. In this case the indictment was returned sometime last year, I believe that it was set for trial in November, is that correct?

Mr. Dixon: That is right.

The Court: It was set for trial in November and this motion to dismiss was filed only a few days ago. There is no showing of hardship. The statement is supported by an affidavit by Mr. Margolis that he had been busy elsewhere, but I notice that the defendants here are not lacking in counsel. There is the firm of Katz, Gallagher & Margolis, each of

whom are good lawyers, as well as a firm having five names in San Francisco, and Mr. Kenney, none of whom lacking in acumen, [16] intelligence or industry. As I say, I would feel justified in denying the motion summarily and preemptorily on the ground that it was not timely filed, except that from the state of the cases there appears to be no easily or readily ascertainable standard. Perhaps counsel in the course of the argument can point one out to me. The matter therefore should proceed on the basis of hearing whatever the parties have to offer in support of their motions in order that I may rule upon them and make a record for the Supreme Court to determine whether or not they should, in the exercise of their power of the supervision of the administration of justice, take the question, or pass upon it, or reverse whatever decision I reach.

So we will proceed. Where is the second affidavit?

Mr. Calverley: It is here, your Honor.

The Court: By the way, the order directing the jury to return next Tuesday will be vacated because the jury is sent to another courtroom and when we get ready for trial I will have the Clerk call a jury, in the event I should decide against these motions.

Very well. Proceed. I have read the affidavits.

Mr. Margolis: At this time, if your Honor please, I would like to call Mr. Smith to the stand.

EDMUND L. SMITH

called as a witness by and in behalf of the defendants, having been first duly sworn, was examined and testified as follows: [17]

The Clerk: Will you state your name?

The Witness: Edmund L. Smith.

Direct Examination

By Mr. Margolis:

Q. What is your position with the court, Mr. Smith?

A. Clerk of this court, Southern District of California.

Q. How long have you held that position?

A. Since June 1, 1942.

Q. As such Clerk, do you keep and maintain records relating to jury panels from which both trial jurors and grand jurors are selected?

A. Yes, I do.

Q. Will you state whether or not trial and grand jurors are selected from the same sources?

A. They are.

Q. Once lists of persons to serve on this grand jury or trial jurors are obtained, what is done by you?

A. The mechanics of that procedure are that the addresses are first zoned now by the mailing zone, and then envelopes are typed with name and address on them, and a questionnaire enclosed in the envelope with a return addressed envelope to the Clerk.

(Testimony of Edmund L. Smith.)

Those are gotten out as time and my clerical force permit, [18] and it is limited to that extent.

When the questionnaires are returned they are given to a clerk or assistant to place in alphabetical order according to the name, and then cards are typed from those questionnaires with the name and address and zone number on each card.

Then from the cards typed the tickets, which are to go into the jury box, with just the name of the prospective jurors thereon.

That is what is done up to the time of placing the names in the box by the jury commissioner and myself.

Q. Are all of the names placed in the box at the same time or are names added to the box from time to time?

A. Names are added from time to time. When we empty the box we gather what cards and tickets have been made up at that time and place them in the box. Usually we are limited on time in doing that because the venire must be drawn in sufficient time contemplated ahead for the preparation of the venire, the mailing lists and the issuance by the Marshal of the summons.

Q. Will you state how and when grand jury panels and trial jury panels are drawn from this box?

A. Usually the names are drawn from the box by myself in the courtroom or the judge's chambers, the senior judge's chambers.

(Testimony of Edmund L. Smith.)

Q. When I said when, I meant at certain times of the [19] year or when ordered by the court. When are names drawn from the box, both for grand jury service and for trial jury service?

A. Only upon order of the court.

Q. With respect to grand jurors, is that done twice a year?

A. That is done immediately before, a month or so before, the commencement of each term.

Q. And there are two terms each year?

A. Two terms in this division. I assume you are speaking of this division of the court?

Q. That is right. You have so understood all of the questions that I have put to you so far?

A. That is right.

Q. And all of my questions will be directed to this division and to your practices.

A. Yes, sir.

Q. Now how many names are drawn from the jury box for grand jury service?

A. Well, how far back do you want me to contemplate?

Q. What was the practice in 1946?

The Court: Let us get the record straight on this matter. This indictment was returned on August 25, 1946. Upon what date was the grand jury impaneled, Mr. Clerk, that returned that indictment? [21]

The Witness: That grand jury was impaneled February 6, 1946; Wednesday, February 6, 1946.

(Testimony of Edmund L. Smith.)

Q. (By Mr. Margolis): When were the names drawn from the box, or approximately when were the names drawn from the box from which this grand jury was selected?

A. I intended to bring that card with me. I believe it was in December of '45.

* * *

Q. (By Mr. Margolis): Now at that time, whether it was December or about December, 1945, how many names were drawn from the box for grand jury service? A. Fifty names.

Q. What was done with those 50 names?

A. Those 50 names were typed on a venire and a venire issued to the Marshal.

Q. Go on.

A. With the names, addresses, mailing zone numbers, upon the registry mail list which I prepare for the Marshal.

Q. Those persons who had been selected were then ordered to appear in court, is that right?

A. That is right. [21]

Q. And before whom were they ordered to appear? A. Before the senior judge.

Q. All 50 of the persons whose names were drawn were so ordered to appear, is that correct?

A. The venire was so issued to the Marshal.

Q. No excuses to any individuals were made by yourself or anyone else prior to the date of the required appearance of these persons in court?

A. None, none; never.

(Testimony of Edmund L. Smith.)

Q. In what manner, if you know, were the 23 persons on the grand jury selected from the 50 persons summoned as you have indicated?

A. The venire, as I say, was issued in the latter part of December perhaps and returnable on February 6. In the interim requests by mail and affidavits for exemption, claiming exemptions and excuses, were transmitted to the senior judge, and those who were excused by the judge were so noted upon the list, and from the remaining panel 23 were drawn by chance from a jury box in open court on the return day.

Q. Were these excuses made prior to February 6, 1946 or at that time?

A. I haven't checked that. It can be ascertained from my records, however.

Q. Let me go then to the next question——

The Court: What is the practice in that connection? [22]

The Witness: The practice is where an exemption is claimed and the senior judge excuses the juror in advance of the return date, that prospective juror is notified, either by mail or otherwise, so that the juror will not have to appear on that date.

The Court: What is the practice in connection with excuses offered at the time they appear, do you know?

The Witness: The judge at that time that the jury is ordered to appear states to those present, "Any having excuses to offer may present them to the court at this time."

(Testimony of Edmund L. Smith.)

Q. (By Mr. Margolis): And if the Court thinks that the excuses are proper they are excused at that time, is that correct?

A. They are excused, and only those names of those remaining are placed in the box.

The Court: And 23 of them drawn in open court?

The Witness: Twenty-three are drawn in open court by chance.

Q. (By Mr. Margolis): How many names were there remaining after excuses in February 6, 1946 when that grand jury was drawn and impaneled?

A. My recollection is that of those totally excused prior and at the time, there remained only about 27 or 28, perhaps it might be 29, I am not sure. [23]

Q. But somewhere between 27 and 29?

A. Yes.

Q. You used the phrase "totally excused." What did you mean by that?

A. Totally excused, of those that were excused at the time on the return date, in open court and those excused prior to that date.

The Court: You mean the total of the two?

The Witness: The total of the two.

Mr. Margolis: I see.

Q. Then the 23 people so selected were impaneled as the February 1946 grand jury?

A. That is right.

Q. And that is the grand jury that returned the indictment in the case now being heard?

(Testimony of Edmund L. Smith.)

A. That is the grand jury for that term in which the indictment was returned.

Q. Mr. Smith, is this method that you have described of selection of the grand jury for the February, 1946 term the method that has been generally in use, or is that a different method?

A. I may say that during the war, in 1941 and during the period that the Army was organized, we had great difficulty in obtaining jurors and we had to draw a great many more to obtain sufficient names for the panel.

The Court: What do you mean by that? You mean there were 50 on that grand jury and sometimes you had more?

The Witness: Sometimes we had more.

The Court: How many more?

The Witness: 100, 150.

The Court: That is the practice in the last five years?

The Witness: Yes.

The Court: Have you ever had more than 150?

The Witness: I would have to check that. I would say rarely would it go over 100 or 150 for the grand jury.

Q. (By Mr. Margolis): In other words, you mean that you would have to draw 100 to 150 names from the box in order to secure 23 or more names from which a grand jury could be drawn, the rest being excused because of the urgency of war business, is that right? A. That is right.

(Testimony of Edmund L. Smith.)

The Court: You mean you would have to draw 100 or 150 names from the master box, not the box in the courtroom?

The Witness: The master box.

The Court: That is to say, that would be the venire you would send to the Marshal?

The Witness: The writ of venire contained 100 or 150 names. [25]

Q. (By Mr. Margolis): Aside from that variation which took place during the war, has the practice for a number of years been, and is it now, as you have described it with regard to the February 1946 grand jury?

A. Prior—I can't tell you just when that was inaugurated—but prior to a certain date, say prior to the war, the questionnaires were not used.

Q. When did the questionnaires come into use?

A. Approximately 1943.

The Court: Did that follow the Conference of Senior Circuit Judges in relation to the matter of selecting jurors?

The Witness: It did.

The Court: By the way, while you are on the question of questionnaires, have you a blank one?

The Witness: I didn't bring them into court.

Mr. Margolis: We are going to ask for all of the questionnaires. We are going to offer all of the questionnaires in evidence, your Honor, because we have exhibits based upon those questionnaires.

The Court: I thought if we had a blank one now it would be useful.

(Testimony of Edmund L. Smith.)

Mr. Margolis: I think it would be useful.

The Witness: I will have one brought in.

The Court: We can put it in the record at this point. [26]

Mr. Margolis: Very well, your Honor.

Q. Since 1943, and with the variation as to numbers which you placed during the war, has the practice been, and is it now, with regard to selection of grand juries the same as it was for the selection of the February 1946 grand jury?

A. The practice is the same. However, we have not stated here fully the modus operandi of obtaining the names.

The Court: I think he is going to get to that in a few minutes, aren't you?

Mr. Margolis: As a matter of fact, your Honor, under my theory of the matter I am not concerned with the matter of getting the names. We are relying entirely on a different approach. That is a matter of, shall we say, defense to the motion.

We propose to offer statistics with regard to the composition of this grand jury which will indicate that it is not possible by chance to have gotten the type of a jury if any proper method were used. If a method designed to secure a cross section of the community were used, it would simply be impossible to get the kind of a panel that we have.

I am prepared to argue the law at the appropriate time. If your Honor wants it now I will proceed now.

(Testimony of Edmund L. Smith.)

The Court: Your question was directed to the practice of securing grand jurors and I do not know that the Clerk answered it. [27]

The Court: Confine your answer to the question of the general practice, is the general practice still followed that as you have outlined or does it vary as to the number of names on your venire or in any other particular?

The Witness: It varies as to the names on the venire as to the number of names used for the last two years.

The Court: The number of names?

The Witness: The number of names.

The method that I have described should be supplemented by the fact that I go into the cards of 25,000 or 30,000 approximately and select names at random through the alphabet of those jurors who have not served for the past three or four years.

The Court: You are getting now into the general method of getting names. For the moment I would like to have you confine your answer to the method of selecting the grand jury, beginning with the number on the venire and going through the procedure you have just described.

The Witness: The method is the same except for the number of names.

The Court: It varies from time to time, is that correct?

The Witness: The number of names?

The Court: Yes, on the venire.

The Witness: Yes.

The Court: Very well. [28]

(Testimony of Edmund L. Smith.)

Q. (By Mr. Margolis): Aside from that, the placing of names in the box, the manner of granting excuses, the time when excuses are granted and selection of 23 names in open court, the method is the same, is that right?

A. It is the same; that is right.

Q. When was the panel of trial jurors selected which will be utilized in this case?

A. The present panel was drawn from the box on January 2nd.

The Court: When you say the box, you mean what we can refer to as the master box as distinguished from the jury box?

The Witness: The master box, the box in which the jury commissioner and clerk place the names.

The Court: May we refer to that throughout the proceedings as the master box?

Mr. Margolis: Yes, your Honor.

The Court: In order that it may be identified and distinguished from the box used in the courtroom.

Mr. Margolis: You might call it the master box and the courtroom box, if your Honor has no objection.

The Court: Very well.

Q. (By Mr. Margolis): What was that date again? A. January 2nd or 3rd. [29]

Q. 1947? A. 1947.

Q. You mean the master box, it was drawn from the master box, is that right?

A. Drawn from the master box; yes.

(Testimony of Edmund L. Smith.)

Q. When were the names placed in the master box prior to the date of the drawing of the panel from the master box in January of 1947?

A. Shortly prior thereto.

Q. How many names were placed in the master box at that time?

A. There were 637 in the box, as I recollect—oh, you are talking about this panel—855.

Q. In other words, so that we are entirely clear, Mr. Smith, sometime shortly before January 4th or 5th, 1947, 855 names were placed in the master box, is that right? A. That is right.

Q. Now were those names placed in there to be used over any specific period of time?

A. They were placed in there pursuant to order of court.

Q. Do you have that order here?

A. I have a certified copy of the order.

Q. May I see it?

A. (Producing document.)

Mr. Margolis: I will ask, your Honor, that this certified copy of an order dated January 2, 1947, in the United States District Court, Southern District of California, in the matter of placing of names of citizens in jury box for service as grand jurors and trial jurors at Los Angeles, California, in the Central Divisin of the Southern District of California, be marked as Defendant's Exhibit A for the purpose of this motion.

The Court: It will be so marked.

(The document referred to was received in evidence and marked Defendant's Exhibit A.)

(Testimony of Edmund L. Smith.)

Q. (By Mr. Margolis): Mr. Smith, has the practice in the past been that you receive an order of the kind which is in evidence as Defendant's Exhibit A at definite intervals or simply from time to time? A. From time to time.

Q. Does it occur usually about once a year?

A. In the last, I would say, two years it has.

Q. Occurred once a year A. Yes.

The Court: What precipitates it?

The Witness: The exhaustion of the names in the box primarily; the names remaining being under 300.

The Court: In other words, as soon as the names are under 300 the matter is called to the attention of the senior [31] judge who makes an order identical with this one or similar?

The Witness: Similar; almost identical each time.

Q. (By Mr. Margolis): When you receive that order the names remaining in the box from the group previously placed in the box were removed and a new group of 850 or 855 names placed in there?

A. Some of those that were in there will be placed back.

Q. Some of those will be placed back?

A. Yes.

Q. How do you determine which ones are placed back?

A. They usually are. If we have questionnaires for them now, and there would have been questionnaires for the last two years.

(Testimony of Edmund L. Smith.)

Q. In other words, since you have been having questionnaires filled out by each prospective juror, when an order like this has been made you have, in effect, kept in the box the names of the jurors who had not yet been drawn from the box and in addition added a number of new names, is that right?

A. That is approximately correct.

Q. Well, I wonder if you would state in what respects, if any, that that is incorrect?

A. I can't recollect exactly. Last December, at the time the jury commissioner and I emptied the box, there were [32] approximately only 17 names left. I believe that some of those names went in, but I am not sure.

Q. Do you know how it was determined which names should go in and which should not?

A. We would have the tickets and the cards and the questionnaires. If there were any of those elements missing, the name would not go in.

Q. Didn't you have a ticket and a card and a questionnaire for each person or each name that was placed in the box prior to the time that it was placed in the box?

A. There should be; yes.

The Court: Do you have that blank questionnaire there now?

The Witness: I do.

The Court: We will mark that Exhibit B. This is what you mean when you refer to a questionnaire?

The Witness: Yes.

(The document referred to was received in evidence and marked Defendant's Exhibit B.)

(Testimony of Edmund L. Smith.)

The Court: Have you a form of card also?

The Witness: We have the cards here.

The Court: Is this a form of card?

The Witness: Yes.

The Court: Let me see it a moment.

(The document referred to was passed to the Court.) [33]

The Court: In other words, this is an ordinary 3 x 5 card?

The Witness: A 4 x 6 card.

The Court: A 4 x 6 card?

The Witness: Yes.

The Court: With the name, the one that I have here, H. W. Amelung, manager of poultry products, Southern California, with a lot of numbers that are scratched out, two addresses that are scratched out, and different dates and names of judges, and so forth. That is what you mean by the "card"?

The Witness: That is right.

The Court: What do you mean by the ticket?

The Witness: The ticket is a little slip of similar paper, merely a strip, perforated.

The Court: It is the same kind of a ticket that the clerk has the names of the jury in the jury box in the courtroom?

The Witness: That is right.

The Court: That is a ticket about three-quarters of an inch wide by three inches long?

The Witness: That is right.

The Court: What does that have on it?

The Witness: Just the name.

(Testimony of Edmund L. Smith.)

The Court: So that when you refer in your testimony to a questionnaire you refer to Exhibit B, and when you refer to [34] Exhibit B, and when you refer to a card you refer to the 4 x 6 cards that you have mentioned, and by the ticket you refer to the ticket you have just described?

The Witness: Yes.

The Court: Let us go back to the question counsel asked. You said that when any one of the three of those were missing, that the name did not go back in the box, is that right?

The Witness: That is right.

The Court: That is, if the questionnaire is missing?

The Witness: If the questionnaire is missing.

The Court: How might it be missing?

The Witness: Misplaced. Prior to the time of the jury commissioner and the clerk getting together to place the names in the box, the questionnaires, the cards and the tickets are all checked and those that are not checked are not placed in the box.

The Court: What do you mean by checked? Checked against what?

The Witness: The cards typed and checked with the questionnaires, the tickets typed and checked with the cards.

The Court: That is as to the name and address?

The Witness: Yes.

The Court: All you have on the card is the name, address, occupation—do you have that in each instance?

(Testimony of Edmund L. Smith.)

The Witness: No, I notice on this old card it has one [35] of those on, but that has not been done by me.

The Court: That was a prior jury clerk?

The Witness: A prior clerk.

The Court: The card now merely has the name and address on it, is that correct?

The Witness: Practically all the cards contain merely the name and address and zone number.

The Court: And zone number?

The Witness: Yes.

The Court: So you check those before you put the names in?

The Witness: That is right.

The Court: And the Exhibit B might be missing because it was misplaced?

The Witness: Misplaced.

The Court: The card might be for the same reason?

The Witness: Same reason.

The Court: What about if somebody died, do you leave their names in there?

The Witness: If we know if it is called to my attention that name is taken out.

The Court: Do you check against the death records?

The Witness: No. That is one of the purposes of sending out the questionnaires. When we get a return from a dead prospective juror we take his name out. [36]

(Testimony of Edmund L. Smith.)

The Court: In other words, the only time that you ascertain whether or not a name has been on the questionnaire and on the card or in the box or in any one of the places of the three, is when there is a return from some message that you have sent him either to appear, to answer a questionnaire or to do jury duty?

The Witness: Yes, or others if we have been informed from any source that a person is deceased or is moved out of the district.

The Court: Then in summary, your answer is that unless you have been notified that the person whose name was in the box is dead, has moved out of the district, or you have misplaced either the questionnaire or the card or the ticket, the name goes back?

The Witness: Usually.

The Court: Well, is there any element of chance in putting the name back? You say "usually." What other reason is there?

The Witness: Sometimes they haven't been placed back.

The Court: Why is that? That is what counsel wants to know and that is what I would like to know. Is it for any particular reason, or what reason is it?

The Witness: The reasons that I have mentioned. I believe in most cases the names are placed back. The questionnaires and cards are checked with the names in the box so [37] there will be no duplication of names, and sometimes a new card is

(Testimony of Edmund L. Smith.)

made up from a new list furnished by the jury commissioner, and we find that we already have a card for that juror. All of the cards are checked, all the new cards are checked, with the names then in the box and those for which we already have cards and who have served in the past, or in what is called the available box.

The Court: Who puts these names back in the box, do you or the jury commissioner, or both of you?

The Witness: Both of us.

The Court: Together?

The Witness: Whatever names go in the box.

The Court: I mean, from those that were taken out, is that your choice or his choice?

The Witness: Both. He puts in one and I put in one. Each of us alternately place a name in the box.

The Court: All, however, from this card index?

The Witness: From the card index compiled first from the questionnaires and then from the cards.

The Court: And the names are secured how? By you and by the commissioner? I mean who secures the names?

The Witness: In the first instance?

The Court: Yes.

The Witness: The jury commissioner primarily has furnished the bulk of the list. I have obtained

(Testimony of Edmund L. Smith.)

from time to [38] time, you might call them minor lists in comparison with the percentage of names obtained.

The Court: Very well. Excuse the interruption, counsel.

Mr. Margolis: It is very helpful, your Honor.

Q. Now from this group of names which were placed in the master box in 1947, when was the first drawing made and for what purpose?

A. On January 3rd two separate venires of petit jurors were drawn at that time, and the grand jury panel.

Q. All three on the same day?

A. The same day.

Q. Which was drawn first, if you recall?

A. I couldn't say. I believe they were drawn in order of the return date on the venire.

The Court: Which was the earliest return date?

The Witness: The earliest return date was the one of the petit jurors of 200.

Q. (By Mr. Margolis): That was the petit jury that was impaneled on February 3, 1947, is that right?

A. That is right. The next one drawn would be the 50 jurors returnable on the following Wednesday.

Q. Anyway, a few days after February 3, 1947?

The Court: That would be the 12th.

The Witness: The first Wednesday of February.

The Court: The first Wednesday would be February 5th.

The Witness: I believe that was the date.

(Testimony of Edmund L. Smith.)

The Court: February 5th is when the grand jury was returned?

The Witness: Yes.

The Court: When was the first trial jury returned?

The Witness: The first trial jury of 200 was Monday.

The Court: This is the third?

The Witness: Yes.

The Court: And the next?

The Witness: The next trial jury was, I believe, the term of February 17th and that was drawn next.

The Court: That was yesterday?

The Witness: Yes, sir.

Q. (By Mr. Margolis): That is the panel from which the prospective jurors to try this case will come, the panel on February 17th, is that right?

A. Well, with this qualification that there have been since drawn out 250 more returnable names next Monday, and of course if this case should not proceed to jury trial until the following March 10th it may be possible that there would be jurors from that venire.

Q. If the jury is selected prior to March 10th then it will come from the panel which was impaneled on February 17th, if all or part of the jury is selected after March 10th it is [40] possible that some of the jurors will come from that later panel?

A. That is right.

The Court: Will all the jurors come from the panel of the 17th or will any of them come from the panel of February 3rd? What do you do with those jurors?

(Testimony of Edmund L. Smith.)

The Witness: The only jurors that have been working up to the 17th, and the jurors who were qualified yesterday, were informed I believe in court to return for this trial, at least some of them.

The Court: Today?

The Witness: Today.

The Court: Let me get this straight now. You got 200 names on February 3, is that correct?

The Witness: Yes.

The Court: From that list of 200 names, how many jurors were selected?

The Witness: As I recollect there were something approximating 70.

The Court: From the 200 of yesterday how many were selected?

The Witness: I don't know. There were approximately 70 present in the courtroom, as my deputies inform me.

The Court: That would indicate from your custom that the remainder had been excused? [41]

The Witness: Or no return, deceased, moved out of the district or hadn't received the summons.

The Court: So that now there is available in this division and district for trial of either civil or criminal cases a total panel of approximately 150 who have been sworn and not excused?

The Witness: I would say between 100 and 150.

The Court: Now I first excused this panel until next Tuesday. I later revoked that order and announced that the Clerk would call a jury when notified. Now who does he call, who does he get, the February 3rd batch or the February 17th batch?

(Testimony of Edmund L. Smith.)

The Witness: Whatever it is in it.

The Court: Or both?

The Witness: Maybe both.

The Court: What do you mean, maybe both? Are they all just put in a batch there together and then called, is that what has happened?

The Witness: There are two boxes and the names in the first instance are placed only in the one box.

Mr. Margolis: May I interrupt? The witness doesn't speak very loudly. May I have the first part of the answer read?

The Court: He said there are two boxes and the names are placed in the first instance all in one box.

The Witness: That is right.

Q. (By Mr. Margolis): What do you mean by there are two boxes? What boxes are you referring to, two courtroom boxes as distinguished from the master box which we have been talking about?

A. No, we are not considering the master box at all there. This is after the jury is impaneled and those jurors who are subject to report at the direction of the court.

The Court: There is still a third box then.

The Witness: If you are talking about the third box in the courtroom, but we are not talking about the courtroom box, nor are we talking about the master box, we are talking about——

The Court: Another box?

The Witness: Two other boxes which the deputy clerk, acting as—call him a calendar clerk—when a

(Testimony of Edmund L. Smith.)

judge orders a panel, whatever number he orders, the names are drawn out of the first box.

The Court: Are they in that box on what we have described as tickets?

The Witness: Tickets.

The Court: Then the procedure, if I may summarize, is that on the February 3rd jury, after the excuses were done and the jurors, the 70 are selected, their names are put on strips or tickets and those tickets are put in a box which is kept by your calendar clerk? [43]

The Witness: That is right.

The Court: On February 17th they are put in another box, is that right?

The Witness: They are put in the same box.

The Court: They are put in the same box?

The Witness: Yes.

The Court: Then if I want a jury to start this case tomorrow and instruct the Clerk to call a jury panel, your calendar clerk reaches in that box and by lot takes out a ticket and calls that person on the phone and tells him to be here at 9:45 tomorrow, is that the procedure?

The Witness: Summons him by phone or otherwise.

The Court: Well, naturally. Now what is that other box?

The Witness: As the names of the jurors are used and they come back from the trial of a case, they are placed in the second box, and as the names are drawn out and used from the first box ultimately

(Testimony of Edmund L. Smith.)

all of the names will be in the second box. In other words, you are using the names of all those who have not served recently.

The Court: All right. Now you have another jury of 250 coming in, or a venire rather, when?

The Witness: March 10th.

The Court: Now when you select those who are not excused and are qualified and sworn, those names go in that calendar clerk's No. 1 box, is that right? [44]

The Witness: That is right.

The Court: Along with whatever names remain in it?

The Witness: That is right.

The Court: So that if after March 1st I should try this case, or some other case, and call on the Clerk to get a jury, the calendar clerk reaches in and by lot picks the tickets out and summons them and instructs them to be there the next day?

The Witness: That is right.

The Court: Then when the No. 1 calendar clerk's box is empty, you start all over again and take them out of that box?

The Witness: That is right. That is one of the reasons for calling this jury that was impaneled yesterday to report today, because the first box had been emptied.

The Court: It was already empty?

The Witness: Yes.

The Court: Then the statement that you made a while ago I misunderstood. I understood that if,

(Testimony of Edmund L. Smith.)

as and when this case goes to trial and the Clerk is instructed to call a panel of jurors he will select it from whatever jurors have been impaneled since the beginning of the February term?

The Witness: That is right.

The Court: And unused, that is, who have not tried a case?

The Witness: That is right.

The Court: Very well. [45]

Q. (By Mr. Margolis): Mr. Smith, with regard to excuses for prospective trial jurors, are all of those excuses granted or denied, passed on, in other words, by the senior judge and by no one else?

A. Or some other judge acting in his stead.

The Court: That is, if the senior judge is not available?

The Witness: Yes; out of the division or district.

Q. (By Mr. Margolis): But it is a function which is performed by whatever judge is acting as senior judge?

A. That is right.

Q. And by no one else, is that right?

A. By no one else.

The Court: That is to say, neither the clerk nor the commissioner pass upon the excuses?

The Witness: No.

Q. (By Mr. Margolis): With regard to the February 1946 grand jury, what records do you have at the present time? Do you have both the cards and the questionnaires or just the cards?

A. Of the questionnaires I have only been able

(Testimony of Edmund L. Smith.)

to find the questionnaires for the 23 impaneled. I haven't been able to find any of the others who were excused or not impaneled. [46]

Q. You do have the cards for the entire grand jury for which the February 1946 grand jury was selected, is that correct? A. Yes.

Q. And you have handed me those cards?

A. That is right.

Q. These are the same cards that you turned over to people from my office, from the office of counsel representing the defendants, and from which they obtained information, is that right?

A. That is correct.

Mr. Margolis: I don't know, your Honor, exactly what procedure we should follow with regard to introducing these cards and questionnaires in evidence. I might state at this point, so that we can determine the best procedure to be followed, what we intend to do.

* * *

I therefore offer these cards in evidence, but we certainly have no objection to their being withdrawn if needed for other purposes.

The Court: All right. They will be received in evidence and marked as Defendants' Exhibit C.

(The document referred to were received in evidence and marked Defendants' Exhibit C.)

Mr. Margolis: We suggest that each card should be marked. However, if the cards and questionnaires are all marked we will have a lot of marking. It

(Testimony of Edmund L. Smith.)

seems to me that if they are bound together that way they might be reasonably safe.

The Court: They will be marked as Exhibit C and they will be separately referred to, I suppose, by name. In other words, they will be C-Amelung or C-somebody else, whatever the name might be so far as the cards are concerned.

Mr. Margolis: Very well.

Q. You do have, Mr. Smith, the questionnaires for the grand jurors who were actually selected as grand jurors and who served as grand jurors for the February 1946 term?

A. Yes. I believe that I gave you the 23.

Q. Yes. You do not have them in court at the present time, is that right?

A. I do not have them here at present.

Mr. Margolis: I will ask your Honor that a number be reserved for those questionnaires.

The Court: Are they in one package? Can Mr. Hocke get them?

The Witness: Yes. They are on my desk.

The Court: Defendants' Exhibit D

(The documents referred to were received in evidence and marked Defendants' Exhibit D.)

Mr. Margolis: I am going to inquire with regard to all the questionnaires.

The Court: All of the questionnaires for the 25,000 names?

Mr. Margolis: No, for all of the questionnaires for the September 1946 panels which were made available to us, and all of the questionnaires of the 850 persons who were placed in the box.

(Testimony of Edmund L. Smith.)

The Court: This might be an appropriate place in the proceedings to find out about this questionnaire. Do you mind the interruption?

Mr. Margolis: No, your Honor.

The Court: By your affidavit you said there was something like 25,000 or 30,000 names. "At the present time there are files in my office containing approximately 25,000 or 30,000 names of persons for jury service in this district." Do you have questionnaires for each of those?

The Witness: No, sir.

The Court: How many do you have questionnaires for? [49]

The Witness: That I don't know.

The Court: How do you determine when to send a questionnaire or whether or not you do have a questionnaire?

The Witness: Each time that names are obtained by me from this reserve of 25,000 or 30,000 names I select all the names at random through the alphabet of those who have not served during the past three to five years, and questionnaires are mailed to those.

The Court: So that no questionnaire goes to a person until his name is or has been actually selected to go on the venire?

The Witness: No, that is not so.

* * *

Q. (By Mr. Margolis): The 25,000 or 30,000 cards that you refer to, are those cards of persons who at some time or other in the past have served as jurors or grand jurors?

(Testimony of Edmund L. Smith.)

A. Both served, may have served or may have been excused or may have not served at all.

Q. But whose names were in the master box, or were selected for placing in the master box, at some time in the past, is that right?

A. Lists were made up and the cards typed for future [50] use, or they have been used.

Q. And when you selected the 855 names to go into the box, as you have testified here, 1947, those 25,000 or 30,000 cards was only one of the sources that you used for obtaining names, is that right?

A. Yes. And, as I recollect, on that panel there were very few of those used.

Q. In other words, you go to a number of sources, and one of the sources that you go to for obtaining persons whose names should go into the master box is these 25,000 or 30,000 cards of jurors who have previously been selected and placed in lists?

The Witness: That is correct.

The Court: Of prospective jurors?

Mr. Margolis: Prospective jurors previously selected.

The Court: I understood some of them were jurors, some of them had never served, and so forth.

Now getting back to this questionnaire, when do you decide to send the names in the box a questionnaire?

The Witness: For instance, I am having one of the clerks prepare and mail questionnaires to, as I recall now, 1000 names in the box in addition to any lists that I may have from the commissioner.

(Testimony of Edmund L. Smith.)

Mr. Margolis: May I interrupt you?

Q. When you say names in the box, I wonder if you would [51] in each case be specific as to which box you refer to. You don't mean names in the master box, they don't go into the master box until you get a questionnaire.

A. That is correct.

The Court: This is a reserve box.

The Witness: I mean the cards, I mean from the index cards. I shouldn't have said box.

The Court: Isn't it a box?

The Witness: These cards are filed in drawers.

Mr. Margolis: I am sorry I interrupt you.

The Witness: During the year 1945, I believe, or 1944 perhaps, we mailed out between 5000 and 6000 questionnaires to prospective jurors and obtained about 1800 returns, and later questionnaires were mailed out, perhaps between—

The Court: Let's find out when you send questionnaires to those people whose names are in that drawer.

The Witness: I am sending them to them approximately all the time, whenever I can spare the clerical help to get them out.

The Court: Regardless of whether the name has been taken by you to drop into your master box?

The Witness: Yes.

The Court: In other words, it is a continuing process, if I may make the suggestion, a continuing

(Testimony of Edmund L. Smith.)

process by which you are endeavoring to secure a questionnaire on file for [52] every name that is in your drawer?

The Witness: That is right.

The Court: So that when you decide to select it you have both the card and the questionnaire?

The Witness: Well, we will have a card and a questionnaire and then we will make up the tickets therefrom.

The Court: We will get to the tickets later. The reason you do not now have questionnaire for all of your 25,000 or 30,000 names in the box is due to lack of clerical help?

The Witness: That is right.

The Court: But every name which has been taken by you or has been put in the master box has first had a questionnaire sent to them and received by you?

The Witness: In the last two years.

The Court: In the last two years?

The Witness: Yes.

The Court: All right. And that questionnaire is Exhibit B?

The Witness: That is correct.

The Court: Is there anything on the names in those boxes to indicate the race, color, religion or previous condition of servitude.

The Witness: Nothing.

The Court: Is there anything on the names in the box which indicates their occupation? [52]

(Testimony of Edmund L. Smith.)

The Witness: Not on the cards. On the questionnaires some of them have occupations.

The Court: Is there anything that indicates their religion?

The Witness: Nothing, unless, as I recollect, some claim of exemption by a juror on the ground of a minister or Christian Science practitioner. That would be the only instance.

The Court: But there is no space or form provided for it and no systematic effort made to ascertain or disclose any of the things that I have indicated?

The Witness: Nothing.

The Court: By the way, while we are on the subject, the charge is made, I think, that negroes were excluded from the February 1946 grand jury.

The Witness: That is not true.

The Court: Can you tell from the cards whether they are Negroes or anything concerning their race or color?

The Witness: No.

The Court: How do you know that that is not true?

The Witness: They were drawn from there.

The Court: Did you see Negroes on the jury?

The Witness: I have seen them in the courtroom.

The Court: During that 1946 grand jury?

The Witness: I won't say on the grand jury, but on the petit juries. A lot of them were excused.

(Testimony of Edmund L. Smith.)

The Court: By the way, I think we can take notice—Mr. Calverley, you handled the 1946 grand jury?

Mr. Calverley: I did, your Honor.

The Court: Do you wish him to be sworn or can we accept his statement?

Mr. Margolis: No, he need not be sworn.

Mr. Calverley: Your Honor, my recollection is that when this grand jury was impaneled in Judge McCormick's courtroom, there was one Negro who was called and stepped forward and asked to be excused, and the judge excused him.

The Court: There were Negroes on one grand jury that reported to me last year.

Mr. Calverley: On the September 1946 grand jury there was one Negro who served throughout the term.

As to the grand juries prior to that time, the one prior to February 1946, there were no Negro on that one, as I recall. However, prior to that time I wasn't here and I don't recall and my statement would have to be made on information that there were a number of Negroes on the grand juries.

The Court: I think I can take judicial notice and state for the record that the trial jury in the September 1946 term—I handled the criminal calendar—I know that in one case I had two Negroes sitting in the twelve in the box of twelve. How many there were, I do not know, they were going and coming, but there were Negroes. [55]

(Testimony of Edmund L. Smith.)

Mr. Margolis: I want to say, because of the shortness of time we didn't make a study on that question.

The Court: The point was made in your affidavit.

Mr. Margolis: We had intended—if I may state what happened—we thought at the time that the affidavit was filed that we would deal with something like 200 or 300 questionnaires. We found out later on that we would have to deal with something like 1000 or 1200 questionnaires, and we had to limit our study.

Now the preliminary examination upon which the affidavit was based indicated to me—I am fairly familiar with the location of Negroes in Los Angeles—that there was a disparity of selections from the heavily populated Negro districts in Los Angeles, and that was what my affidavit was based on.

The Court: Do you expect to make that point?

Mr. Margolis: We are satisfied, your Honor, that the showing that we will make with regard to occupation will be sufficient. We are going to rely upon that.

The Court: You do not intend to rely on the asserted proposition that there was discrimination on account of race against members of the African race?

Mr. Margolis: That is right, because of the time element we haven't had time to gather the evidence.

The Court: Your answer to my question is in the affirmative?

(Testimony of Edmund L. Smith.)

Mr. Margolis: No, we do not intend to.

The Court: You do not intend to rely upon that?

Mr. Margolis: That is right.

hTe Court: Very well.

Mr. Margolis: We do intend to rely——

The Court: However, it is a matter of appropriate inquiry, is it not?

Mr. Margolis: I should think so, your Honor. I think that the Appellate Courts have indicated that it is the duty of the court on its own motion, if necessary, to make that kind of inquiry and I am of course not objecting.

The Court: It never occurred to me to make the inquiry because I have heard no discrimination against Negroes, due to the fact they have actually sat in the trial of cases and grand juries reporting to me as a judge, from which fact I now take judicial notice for the record.

Mr. Margolis: I might state, as far as the law is concerned, the case of *Smith v. Texas*, in that case there were Negroes both on the panel and on the grand jury but it was nevertheless held to be discrimination, that the mere presence of Negroes doesn't satisfy the test.

The Court: The test in that case, however, was different than in the other cases. The test in the *Smith v. Texas* case was whether or not equal protection of the law had been denied under the Fourteenth Amendment. No such test is applied [57] by the court in the *Thiel* case or the *Ballard* case or in the *Glasser* case, and none is indicated. That is one

(Testimony of Edmund L. Smith.)

of the reasons why I indicated at the commencement of this proceeding that the law lacks some clarity.

Mr. Margolis: I think, your Honor, that while the Thiel case was not based upon equal protection of the law, because it does not have to be, I think that discrimination with regard to occupation is equally a point as discrimination with regard to race, as far as the Constitution is concerned.

The Court: The Court said in the Thiel case that there wasn't any constitutional violations, no unconstitutional discrimination. There are in the Glasser case or in the Ballard case.

Mr. Margolis: I think, your Honor, they said their decision was not based upon constitutional grounds, and I think that the difference between the Thiel case and the Smith case is that in order to rely upon constitutional grounds the person claiming the denial of his rights must be one of the class discriminated against, whereas where it is merely a question of the administrative, supervisory functions of the Appellate Court, then the person raising the charge of the improper selection of the jury or grand jury need not be within the class discriminated against.

The Court: Well, maybe you can straighten me out on it, but it seems to me a little bit confusing because in the Thiel [58] case they did not base it upon any violation of any rule, violation of any statute, the denial of any constitutional rights at all, but merely upon their power to supervise the administration of justice by the lower courts, and

(Testimony of Edmund L. Smith.)

laid down no standard except the single one that I have indicated, that there was a discrimination of a class in their exclusion.

Mr. Margolis: In the Thiel case we are dealing with a constitutional point—I mean with an administrative point—and therefore injury to the individual was not material. The Court was concerned entirely there with whether or not the method of selection of the jury was a proper method.

The Court: I don't know. Proper by what method? Denial of due process?

Mr. Margolis: From an administrative process.

The Court: If they had said it was a denial of due process, then I would have had a myriad of decisions to which I could have recourse and ascertain what is meant by due process.

Mr. Margolis: If I may make this point, let's assume that we have a white defendant. As to him a jury from which Negroes are discriminated against, or where there are no Negroes, does not constitute a violation of constitutional rights because he is not within the class discriminated against. But as to a Negro, the absence of a Negro on the jury will go to the constitutional rights involved. So the absence of particular classes or types of persons may be [59] either a constitutional or an administrative violation, according to whether the person, the defendant in the case or the plaintiff in the case, is one of the class or group being discriminated against.

(Testimony of Edmund L. Smith.)

In other words, even the absence of Negroes from juries is not always a constitutional point. It only becomes a constitutional point when a Negro is involved. Similarly, the absence of certain economic groups from the jury may be either a constitutional point or a simple administrative point, as distinguished from a constitutional point.

The Court: I did not mean to interrupt and get on this discourse of the law. I think while we have the witness on the stand we ought to finish with him.

Mr. Margolis: I wonder if we could have the last question and answer.

The Court: The witness asks why we sent for the questionnaires.

Mr. Margolis: Are they here?

The Court: Yes.

Q. (By Mr. Margolis): I have here a number of questionnaires. On top of the whole group of questionnaires is a blue slip with the words "February term 1946, petit jury," and then down near the bottom of the list of questionnaires there is inserted a blue slip with the words on it "grand jury." I wonder if you could [60] explain what those slips and words mean.

A. The group of questionnaires placed under the top card which you have described purport to be the questionnaires of petit jurors impaneled for the February 1946 term.

The Court: You say they purport to be?

(Testimony of Edmund L. Smith.)

The Witness: I haven't examined or compared them and I can't accurately state that each one of them is.

The Court: What is the other one now?

The Witness: The other 23 questionnaires marked "grand jury" purport to be the questionnaires of those 23 jurors impaneled as the grand jury for the February 1946 term.

Q. (By Mr. Margolis): Unless there has been some clerical error in filing those questionnaires, they not only purport to be but they are what you say? A. That is correct.

Q. And you know of no clerical errors in filing?

A. Not to my knowledge.

Q. Those questionnaires, both groups that you have identified, were also turned over to people from the office of the attorney representing the defendants from which they obtained information?

A. These are the same questionnaires; yes.

Mr. Margolis: I would like to offer as two separate exhibits, if your Honor please, because different exhibits will [61] be based upon them, the questionnaires for the February 1946 grand jury.

The Court: They will be marked D.

Mr. Margolis: And the questionnaires for the February 1946 petit jury as a separate exhibit.

Mr. Calverley: If the Court please, in connection with that I would like to ask the witness a few questions as to the foundation for the introduction of this exhibit, if I may.

The Court: Yes.

(Testimony of Edmund L. Smith.)

Voir Dire Examination

By Mr. Calverley:

Q. Mr. Smith, with reference to the questionnaires of petit jurors, do the list of questionnaires which have been handed to you by counsel include the names of all the petit jurors whose names were placed in the master box in February 1946?

A. They do not.

Q. What is the fact with reference to the questionnaires of the grand jurors, does that include all of the grand jurors whose names were placed in the master box?

A. They do not.

Q. Where are the rest of the questionnaires?

A. I have been unable to locate them, and the deputy who had charge of them has been unable to locate them. He stated that some were probably in the subsequent panels, but [62] I haven't located them.

Mr. Calverley: If the court please, we object to the introduction of the exhibit on the ground that it is incomplete.

That is all that is available, your Honor.

Mr. Calverley: There is no proper foundation laid.

The Court: They will be marked for identification, the grand jury as D, and the petit jury as E.

(The questionnaires referred to were marked for identification as Defendants' Exhibits D and E respectively.)

(Testimony of Edmund L. Smith.)

The Court: Just by way of observation, I am thinking that your challenge goes not to this particular grand jury, the 23 men, or to the particular panel of trial jurors, but it goes to the method of selecting all that went in the box.

Mr. Margolis: That is correct, your Honor.

The Court: For both of them.

Mr. Margolis: That is correct. And I want to say this, that obviously if we had the names or questionnaires for all of the jurors, or prospective jurors whose names went into the box, our records would be more complete. But we intend to show by an expert on the subject that if there had been 1000, or any other number in the box, and if the names were chosen by chance from that box generally the same pattern would be followed and the names chosen by chance from those in the box would be the same as was the pattern of all the names in the box, that there would be some variation but that the variation [63] as compared with the variation from the census figures on population would be very, very small, and that from these records alone the method of selection which results in discrimination can be scientifically established. We intend to show that by an expert witness, your Honor.

Now if we have all of the questionnaires we would produce exhibits based upon all of the questionnaires. The lack of other questionnaires is not due to any fault of the defendants. The defendants have obtained everything that was available and are mak-

(Testimony of Edmund L. Smith.)

ing the most complete study that is possible upon the basis of what is available. I think that scientifically it is sufficient so that a conclusion with regard to whether the system is one which results in discrimination or is not one which results in discrimination can be drawn with reasonable certainty.

The Court: Have you made a search for the questionnaires?

The Witness: Yes.

The Court: Have you been able to find them?

The Witness: We have been unable to find them.

The Court: Have you the record of the total names that went in the master box at that time?

The Witness: There is no way of ascertaining now at this date, and under the system that I have of limited clerical help, exactly the names which were——

The Court: The total number? [64]

The Witness: That were on the total number of names.

The Court: The total number of names that were in the box from which both the grand jury and the petit jury for the 1946 term were drawn?

The Witness: As I recollect, there was 637 names in the box. That was all the questionnaires and cards and tickets that we were able to check at that time.

The Court: Now how many of those were drawn? There were 50 drawn for the February grand jury. How many of those were drawn throughout the rest of the term for the petit jurors?

(Testimony of Edmund L. Smith.)

The Witness: I believe there was 150 each of the two petit jury venires.

The Court: Of 350 drawn out of the 600?

The Witness: That is correct.

The Court: What happened to the rest of them? What happened to the other names at the beginning of the September term?

The Witness: There were 287 names left.

The Court: At the beginning of the September term?

The Witness: In July the 1st of July, the commissioner and I placed I believe 130 names more in the box in order to draw the September term panels.

The Court: 150 more?

The Witness: 130 more.

The Court: Very well. How many questionnaires are here [65] in the exhibit? There are 23 grand jurors and how many petit jurors, do you know?

The Witness: I haven't counted them.

Mr. Margolis: I would like at this time, your Honor, to renew my offer of those questionnaires into evidence.

The Court: I will just leave them marked for identification at the present time and reserve ruling on the offer.

Do you want to use these now?

Mr. Margolis: I want to ask some questions with regard to them.

(Testimony of Edmund L. Smith.)

Direct Examination

(Continued)

By Mr. Margolis:

Q. Now the questionnaires for the grand jury which are marked Defendants' Exhibit D include only those who were actually selected to serve, is that correct? A. That is correct.

Q. The questionnaires for the petit jurors, marked Defendants' Exhibit E, include those who were excused, is that not so?

A. I didn't understand that. I thought those were only the petit jurors who were impaneled.

Q. We want to check that. Will you check that?

The Court: How can you check it?

The Witness: None of them appear to have the mark of the judge on them excusing them. [66]

Mr. Margolis: I see.

Q. You would conclude then that both of those sets of questionnaires, Exhibits D and E, are, first, the grand jury which served and, second, the petit jury which was actually sworn in as a panel?

A. That is correct.

Q. Now you also have questionnaires for the petit jury, for the grand jury, both the panel and those who served and were sworn in in September 1946, and for a panel of trial jurors in September 1946, do you not? A. That is correct.

Q. Do you have those questionnaires here?

A. Not here. They are in my office.

Los Angeles, California; February 18, 1947;
2:00 o'Clock P.M.

* * *

EDMUND L. SMITH

the witness on the stand at the time of recess resumed the stand and testified further as follows:

Direct Examination
(Continued)

By Mr. Margolis:

Q. Mr. Smith, you now have before you the various questionnaires referred to this morning?

A. I have the questionnaires of the 855 names that were in the box, put in the box by the jury commissioner and I on January 2nd of this year.

Q. Do you also have the questionnaires for the September 1946 petit jury?

A. Those questionnaires, I don't know that all of them are here. These are panels. I believe there is the grand [69] jury panel that was drawn.

Q. You have the September 1946 term grand jury panel, is that right? A. Yes.

Q. That includes all of those 50 names who were drawn out of the jury box and from which, after excuses were granted, as testified to by you, the September 1946 grand jury was drawn, is that correct?

The Court: Of 23 members.

Mr. Margolis: Of 23 members; yes.

(Testimony of Edmund L. Smith.)

The Witness: I haven't checked them. I assume they are all there.

Q. (By Mr. Margolis): Incidentally, these are the questionnaires which you also turned over to persons from my office and to myself in connection with the studies, is that right?

A. That is correct.

Q. Our information showed that there were 49 questionnaires here. Is it possible that only 49 names were drawn?

A. It may be that one of those names excused was put—no, that is September. It may have been put in the present box.

Q. That would account for only 49 instead of 50 names?

A. I say that is a possibility. I am not sure. I haven't checked that.

Mr. Margolis: At this time, if your Honor please, I [70] would like to offer in evidence as defendants' next in order the questionnaires for the grand jury September 1946 term panel.

The Court: It will be marked F for identification.

(The questionnaires referred to were marked Defendants' Exhibit F for identification.)

Mr. Calverley: Same objection, your Honor. This proceeding is directed to the February 1946 grand jury, not the September 1946 grand jury.

* * *

(Testimony of Edmund L. Smith.)

The Court: That objection is overruled. Exhibit F is in evidence.

(The questionnaires referred to were received in evidence and marked Defendants' Exhibit F.)

Q. (By Mr. Margolis): Now you have here questionnaires, a group of questionnaires which are labeled "jurors September 1946 term". Will you please tell us what questionnaires those are?

A. I believe these are the questionnaires of those names of petit jurors who were drawn out of the box for whom a venire was issued to the Marshal returnable at the September term.

Q. In other words, that would include, would it not, all of the persons whose names were drawn from the box some of whom were later impaneled and some of whom were excused by the Court, is that correct?

A. I haven't checked them, but I assume that that is correct.

Q. Do you want to take a look at them?

A. That would take some time.

Q. As a matter of fact, there are more questionnaires there than there are jurors who were impaneled for the September [72] 1946 trial jury, isn't that so?

A. Yes, there are more apparently.

Q. So it would include jurors who were excused, is that not so?

A. Yes. I wouldn't say that all of them that

(Testimony of Edmund L. Smith.)

were excused are there. There were 350 petit jurors drawn for the September term, drawn on July 1st.

Q. Do you have any other questionnaires for the September 1946 term for the trial jury?

A. There may have been other questionnaires. A few of them may be in here.

Q. When you say "in here," what do you mean?

A. In this category of the present 855 that were placed in the box January 2nd of this year.

Q. Now, then, as far as you have been able to locate them, the questionnaires which we have referred to and which are labeled "jurors September 1946 term." are all of the questionnaires you have been able to locate of the panel, trial jury panel, selected for that term, is that correct?

A. That is correct.

Q. Now if any questionnaires were removed from the questionnaires covering the entire panel, they were not removed on the basis of the occupation of the persons whose questionnaires were removed, is that right?

A. The clerk has not removed them except that the judge [73] may have ordered them excused permanently or otherwise, and under the direction of the Court then those questionnaires would be disregarded and not used again. If for instance, a prospective juror was disqualified or not competent or was excused for any other reason as ill health or not in possession of his faculties, or for

(Testimony of Edmund L. Smith.)

other cause by the Court, then they would not be used. But the clerk of jury commissioner would not disregard a questionnaire for reasons of occupation except, speaking for myself and not for the jury commissioner, I have, where it came to my attention and we were dropping names in the box, if a name appeared to me of a practicing attorney that I knew, why I would exclude his name. But nevertheless some practicing attorneys have been placed in the box.

Q. Then as far as you are concerned, no names have been, or no questionnaires have been, removed from the group of questionnaires that we are talking about except perhaps some practicing attorneys, is that right?

The Court: On account of occupation?

Mr. Margolis: On account of occupation; yes.

The Witness: That is correct.

Mr. Margolis: At this time, if your Honor please, I would like to offer the group of questionnaires labeled "jurors September 1946 term" as defendants' exhibit next in order.

The Court: If there is no objection it will be received in evidence. [74]

The Clerk: G.

(The group of questionnaires referred to were received in evidence and marked Defendants' Exhibit G.)

Q. (By Mr. Margolis): Now, Mr. Smith, I see you have a number of files or bunches of question-

(Testimony of Edmund L. Smith.)

naires. Are these questionnaires all of the questionnaires for the jurors who were put in the box for 1947, in the master box for 1947, as you have previously testified?

The Court: In January.

The Witness: I am told by the calendar clerk that these are all of the questionnaires which I gave him after the drawing of the panel.

The Court: Wait, now. After the drawing of the panel? Does that mean that if they are all there that those are the questionnaires for the 800 names that were put in the January box from which both the February 1947 grand jury and February 1947 petit juries were drawn?

The Witness: That is correct.

Q. (By Mr. Margolis): Is there any distinction between the questionnaires on any basis whatsoever, according to the manner in which they are fastened together or the groups in which they are fastened together?

A. The calendar clerk has his own system on this. [75]

This is the grand jury as drawn and the grand jurors excused.

Q. I see. We have here a group of questionnaires headed "grand jury February 1947 term" and then below them "grand jurors excused." Now am I correct in stating that all of these names were put into the box, into the master box, in January of 1947 and then were drawn from that box for the February 1947 grand jury and that these ques-

(Testimony of Edmund L. Smith.)

tionnaires represent, the February 1947 grand jury term represents, those who actually served and the grand jurors excused represent those who were drawn in the panel but who were excused from service on the grand jury?

A. That is correct.

The Court: In other words, the long and short of it is that those were the questionnaires for the veniremen?

The Witness: Yes.

Q. (By Mr. Margolis): And they make up part of the 850 names that you have referred to?

A. That is correct.

The Court: They were taken from the 850, is that correct?

The Witness: That is correct.

The Court: How many are there, do you know?

Mr. Margolis: I think there are 50, your Honor.

I would like to offer these in evidence as defendants' exhibit next in order, your Honor.

The Clerk: H.

The Court: In evidence.

(The questionnaires referred to were received in evidence and marked Defendants' Exhibit H.)

Q. (By Mr. Margolis): Now do you have a separate group for those who were selected and were impaneled on February 3, 1947?

The Court: That is petit jurors?

Mr. Margolis: As petit jurors; yes.

(Testimony of Edmund L. Smith.)

The Witness: These are the petit jurors of February 3, 1947.

Q. (By Mr. Margolis): You have handed me a group of questionnaires bearing a card labeled "petit jurors February 1947, Ret."—return, I guess that is. A. Returnable.

Q. "Returnable 2/3/4, 9:30 a.m."

The Court: That is the venire, is that correct, or is that the panel?

The Witness: That I don't know. He hasn't got it labeled. Apparently there were some in here that were excused, so it must include the venire, 200. That would be 200 if it includes all. [77]

Q. (By Mr. Margolis): And these were selected out of the master box and out of the group of 850 were placed in the master box January 1947? A. 855.

Q. 855? A. Yes.

Q. All right.

I will offer this group of questionnaires labeled "petit jury February 1947, returnable 2/3/47, 9:30 a.m.," as defendants' exhibit next in order.

The Court: I in evidence.

(The questionnaires referred to were received in evidence and marked Defendants' Exhibit I.)

Q. (By Mr. Margolis): Now, do you have the questionnaires for those jurors who were summoned to appear on February 17, 1947 as trial jurors?

(Testimony of Edmund L. Smith.)

The Court: That is the venire?

Mr. Margolis: The venire; yes.

The Witness: Yes.

Q. (By Mr. Margolis): I see here a group of questionnaires for petit jurors summoned to appear 2/17/47, 9:30, A to H inclusive. Does that indicate that those are the questionnaires for the jurors [78] whose last names begin with the letters A to H inclusive who were summoned to appear on February 7, 1947 to serve as trial jurors?

A. That is correct.

Q. Do you have the rest of them?

A. The rest of the alphabet is here.

Q. There are no labels?

A. Yes, it is marked here.

Q. I see. Up in the upper left-hand corner of the first questionnaire is written in blue pencil the word "petit, 2/17/47"? A. That is correct.

Q. And those are the balance alphabetically of the questionnaires for the jurors summoned to appear on February 17, 1947?

A. That is correct.

Q. The first name on the second group is Byron Everett Ingrahm, is that correct?

A. That is correct.

Q. And all of these names were likewise drawn from the 855 names which were placed in the master box of January of 1947?

A. That is correct.

(Testimony of Edmund L. Smith.)

Mr. Margolis: This exhibit, which is in two parts, perhaps it should be madked J-1 and J-2, your Honor. [79]

The Court: All right.

(The questionnaires referred to were received in evidence and marked Defendants' Exhibits J-1 and J-2 respectively.)

Q. (By Mr. Margolis): Now you have some questionnaires left. Can you tell us what those are?

A. All of these questionnaires I believe are the balance of the 855 who were excused or otherwise have not been segregated, excused and no appearance. In other words, either the summons didn't reach them, there was no service, or they were excused for various reasons by the Court.

Mr. Margolis: I think we had better start over again.

Q. I have one group here of questionnaires, the first one of which is for Norman J. Adams. Could you tell me what that group of questionnaires represents?

A. That group and this group represent the balance of the 855 which have not heretofore been introduced.

Q. Could you explain why they are broken up into three sections?

A. Apparently these are the excused.

Q. And when you say "these"?

A. This category.

(Testimony of Edmund L. Smith.)

Q. Before we go on, what about the category, the first of the questionnaires of which is Norman J. Adams? Are those the ones that are still in the box? [80]

A. I don't know. One of them here has been excused to May 6th. Some of these questionnaires I don't believe have been segregated.

Q. Segregated for what purpose, Mr. Smith?

A. For the purposes of the jurors who have been excused and some who have been impaneled. I would have to learn that from the calendar clerk. He is the one that separated them.

Q. In any event, if we take these remaining three groups of questionnaires then we will have, together with the questionnaires which have been introduced in evidence as Defendants' Exhibits F to J-2 inclusive, all of the 850 who were put in the master jury box in January 1947?

A. That is correct, so far as I am informed. I haven't checked them myself.

Mr. Margolis: At this point, then, your Honor, I would like to offer as K-1, 2 and 3 the three groups of questionnaires just referred to.

The Court: Admitted.

(The questionnaires referred to were received in evidence and marked Defendants' Exhibits K-1, K-2 and K-3.)

Q. (By Mr. Margolis): Mr. Smith, although you did not have questionnaires for the balance of the February 1946 jury panel, that is, other than

(Testimony of Edmund L. Smith.)

those who actually became grand jurors, the cards [81] which are in evidence as Exhibit C do give the names of the entire February 1946 grand jury panel, is that not so?

A. That is correct, and the addresses.

Q. Names and addresses? A. Yes.

The Court: The panel or only the 23 of the grand jury?

Mr. Margolis: The panel.

The Court: The 50?

Mr. Margolis: That is right. We have questionnaires for those who served, we have cards for the entire panel including those who served and those who did not. The cards are in evidence as Exhibit C.

Q. Now, Mr. Smith, those questionnaires which are in evidence up to this point, and the cards which are in evidence up to this point, are the questionnaires and the cards which you turned over to myself and to persons from the office of attorneys for the defendants and from which they obtained data, is that right? A. That is true.

Q. Now our records show, Mr. Smith, that for the September 1946 grand jury there are a total of 23 questionnaires, to wit, the total of one for each member of the grand jury, but that there are only 20 questionnaires in the file of those excused, or those who were not excluded from the September 1946 grand jury. Can you account for the absence of seven questionnaires? [82]

A. Only by surmise or guess.

(Testimony of Edmund L. Smith.)

Q. Assuming that there were some qualified jurors who were not excused and who were placed in the box finally from which the 23 names were drawn, is it possible that those persons who were not drawn but who were otherwise qualified and not excused were then placed into some other panel?

A. That is correct.

Q. Then their questionnaires would be elsewhere?

A. That is correct.

Q. And that would account for having less than 50 questionnaires for the panel, is that right?

A. That is correct.

Q. Now, Mr. Smith, on your overall summary of the number of questionnaires of jurors that were put in the box January 1947, that gives us 820 new names instead of 855. Can you account of a discrepancy of 33 names?

A. No, I cannot because there was a questionnaire for each card. The cards were made from the questionnaires returned.

Q. Well, I notice that you have several small groups of questionnaires here. Is it possible that a small bunch of 33 questionnaires may have been misplaced?

A. That may be. When I turn them over to the calendar clerk I pay no more attention to them.

Q. Now, Mr. Smith, you mentioned about 25,000 to 30,000 cards that you have in your file of persons who had been selected at one time or another for service as prospective trial jurors or grand jurors, some of whom had served and some of whom

(Testimony of Edmund L. Smith.)

had not served. Do you recall your testimony on that? A. Yes.

Q. Do your 25,000 or 30,000 cards include jurors or prospective jurors who have been excused in the past? A. They do.

The Court: All of them or just some of them?

The Witness: Some of them.

Q. (By Mr. Margolis): How is it determined when a juror or a prospective juror is excused whether his card shall be kept in with that 25,000 or 30,000 or shall be excluded therefrom?

A. The judge determines that.

Q. Do you know on what basis? Do you know what the basis is for that determination?

A. Disqualification or incompetency is the only thing that I can think of.

Q. In other words, if a prospective juror is disqualified from service or is incompetent, as, for example, being deaf, his card would be taken out completely, is that right?

A. Yes. It should be put in what we call the leave-out box. Those cards are still retained. [84]

Q. But they are not included in the 25,000 or 30,000 you referred to? A. No.

The Court: Why do you retain those cards?

The Witness: It is just a habit for checking purposes.

The Court: That is to say, if a name is drawn again you would check that card and discover that he was permanently excused for incompetency or disqualified?

The Witness: Yes.

(Testimony of Edmund L. Smith.)

The Court: Or his name is suggested or proposed?

The Witness: His name which should come up again it would be checked with those cards.

The Court: The question you had before I don't think was answered. Those jurors who were excused and put back in the box, those were temporarily excused?

The Witness: That is correct.

The Court: And the others were permanently excused?

The Witness: Yes.

Q. (By Mr. Margolis): If a juror is excused because of hardship, would that name be put back in the 25,000 or 30,000 cards? A. Yes.

The Court: Why?

The Witness: For future use. The status of that juror may change. [85]

Q. (By Mr. Margolis): When were the names of the 25,000 or 30,000 names selected originally?

A. I notice some cards that went back to 1925.

The Court: Hasn't it been a continuous process since then?

The Witness: Yes, it has.

The Court: By your predecessor and by yourself?

The Witness: That is correct.

Q. (By Mr. Margolis): Is it true that each year cards are added to this group of 25,000 or 30,000 cards? A. That is correct.

Q. And that has gone on since 1925?

A. Before that.

(Testimony of Edmund L. Smith.)

Q. Since before that? A. Yes.

The Court: Cards are added and cards are taken out?

The Witness: Yes.

The Court: After you discover their disqualification, incompetency, death or removal from the district?

The Witness: Yes.

The Court: Where do those names come from? That isn't quite clear to me. Are those all names that were there and that you, as the clerk, have added or does the jury commissioner [86] add to them?

The Witness: The various clerks, three clerks including myself, my two predecessors, myself and the various jury commissioners. Those cards are compiled from the list made up by them and myself over the years.

The Court: Now when the jury commissioner has names to add to the list, does he add them just before you make up your master box or does he add them from time?

The Witness: From time to time he brings me in lists.

The Court: It is a continuing process throughout the year?

The Witness: Yes.

The Court: And he gives you the list of names and what happens to that list of names?

(Testimony of Edmund L. Smith.)

The Witness: As I stated in my previous testimony, the list is given to a clerk who puts the zone numbers on it.

The Court: You mean you give it to one of your clerks?

The Witness: One of the clerks, a clerical assistant or a deputy, who places the mailing zone number after the name.

The Court: Pardon me. You described that procedure. Let us call that processing a name. In short, when he hands you a list of new names, and I understand he does from time to time throughout the year, those names are processed and eventuate now in a questionnaire and a card in this file of 25,000 or 30,000?

The Witness: That is correct.

The Court: How do you file those in the 25,000 or 30,000, alphabetically or according to counties or according to any other classification, occupation, previous condition or servitude, or how?

The Witness: Alphabetically only.

The Court: By sex?

The Witness: No. After the cards are used and go into that available box there is not distinguishment of sex, except some of them are marked "F" for female, I believe, for purposes of mailing or correspondence.

The Court: As the card is there with their name not indicating whether it is Mrs. or what it is, and you mark "F" or "female" on there?

(Testimony of Edmund L. Smith.)

The Witness: Female, because we have had women jurors who at the time the list was given to me were Miss and unmarried, and by the time the questionnaire was returned why she had married, changed her name, so the card would have to be placed under a different alphabetical letter.

The Court: You started to put women into this master file from whence you drew the names for the master box when, I mean the names of women?

The Witness: The first names of women?

The Court: Yes.

The Witness: The first names of women were placed in [88] the box in the latter part of 1943 for the 1944 term.

The Court: How many, do you remember?

The Witness: Approximately 500 or so.

The Court: Were there men put in at the same time?

The Witness: At the same time.

The Court: How many men?

The Witness: I don't remember.

The Court: Do you have any way of knowing what percentage or proportion of the 25,000 or 30,000 names in these drawers are women?

The Witness: No, I have no way, not without counting them.

Q. (By Mr. Margolis): On that point, Mr. Smith, the women have only been added for several years, is that right?

A. Since, as I say, in 1943, the latter part of 1943.

(Testimony of Edmund L. Smith.)

Q. So up until the latter part of 1943, would it be fair to say that more than 80 per cent of the total cards now, which you now have already there, which you had already accumulated, that more than 80 per cent of the total cards which you now have are men?

The Court: Let's ask him if he knows how many cards in the box now have been put there since—when was this, 1940?

The Witness: 1943.

The Court: In February? [89]

The Witness: November or December of 1943.

The Court: Do you know how many cards have gone into that box, regardless of the number that have been taken out since then, since November 1943?

The Witness: No, because when a juror is excused for incompetency or permanently excused by the judge, or deceased or otherwise, it is marked "L. O.," leave-out. Those cards go into the leave-out category drawers. The others ultimately, when the clerk gets time to put them back in their alphabetical order, with a notation of the date excused.

The Court: I don't understand that. What others?

The Witness: The remainder.

The Court: The remainder of what? The remainder of those excused?

The Witness: Yes, who are not permanently excused for incompetence or otherwise permanently excused or deceased or moved out of the country,

(Testimony of Edmund L. Smith.)

other than those the remainder of the cards excused and those who have served up to that time go back into that box.

The Court: You have another drawer or box, do you not, of jurors who have served currently so that the qualification is observed that a person shall not serve as a juror who has served within one year. Do you have a one-year box or something like that, a two-year box?

The Witness: No, except that I have been trying to inaugurate a system of cards and names of prospective jurors to whom have been mailed questionnaires and who have been drawn. I have been starting a new alphabetical list with recent jurors who have served, in other words, going through the 25,000 or 30000 starting another alphabet as they come in.

The Court: You mean you are starting a new master drawer?

The Witness: Available drawer.

The Court: Available drawer?

The Witness: Yes.

The Court: To supplant the 25,000 or 30,000 you now have?

The Witness: Yes.

The Court: And those are made up from the ones who have served?

The Witness: Served or excused.

The Court: Served or temporarily excused and not permanently excused?

The Witness: That is correct.

(Testimony of Edmund L. Smith.)

The Court: So that your present system will eliminate the 25,000 or 30,000 drawer you now have and eventuate in another drawer of available names of men and women?

The Witness: That is correct.

Q. (By Mr. Margolis): Mr. Smith, you say you are starting this new system. [91] As of when are you starting it?

A. I believe those cards do not go back of '45 or '44.

Q. When are you putting this new system into effect of disregarding the 25,000 to 30,000 cards?

The Court: When did you start your new available drawer that you were just mentioning?

The Witness: Approximately a year ago, if I remember correctly.

Q. (By Mr. Margolis): Then when you were testifying about selecting names from these 25,000 or 30,000 cards you mean you don't do that any more?

The Court: I understood he does that but after a person has served on a jury they are exempt for a year, they are disqualified for a year so he has to have some drawer to keep them in for a year, so instead of keeping them for a year he is starting a new available drawer.

The Witness: That is correct. We don't use jurors who have served for three or four or five years.

Q. (By Mr. Margolis): However, you are still using the 25,000 or 30,000 cards?

A. That is correct.

(Testimony of Edmund L. Smith.)

Q. And if a person's name once gets in there that name stays in there until you learn that the person has become incompetent or has died or has left the district, is that right?

A. That is correct.

The Court: Or otherwise permanently excused?

The Witness: That is correct.

Q. (By Mr. Margolis): The accumulation up to 1943 consisted of exclusively men, is that right?

A. Yes. There were women occasionally who appeared but were excused.

Q. And you wouldn't have a card for them?

The Court: You mean there were women who appeared before that?

The Witness: Yes, by similarity of names, like Frances. It might be spelled "c-i-s" and "c-e-s." Those names were put in the box, you might say, in error.

Q. (By Mr. Margolis): Then the card would be thrown out? A. Yes.

Q. So that your accumulation of cards prior to 1943 consisted exclusively of men, is that correct?

A. That is correct.

Q. And since 1943 would you say you had about 50 per cent men and 50 per cent women?

A. Oh, no. Women are added each term during the year but some of the men will be drawn out of this available 25,000 [93] or 30,000 cards.

Q. I don't quite understand what you mean by saying that the women are added each term. Aren't women's cards placed in with the men's cards now?

(Testimony of Edmund L. Smith.)

A. Yes, but when you consider that, as I just stated, we do not use jurors who have served within the last three or four or five years notwithstanding that they would be competent if they had served over one year, but we would go back so as to not burden those people within three, four or five years.

Q. I understand that, Mr. Smith.

The Court: What he is trying to get at is this: Of the names that have gone into the box since you have started putting women in, have the new names been half women and half men or what?

The Witness: There is no set proportion. It is according to how the questionnaires come back and how many names we have available at the time.

Q. (By Mr. Margolis): There has been no definite attempt to get more men than women or more women than men since 1943?

A. No, but the jury commissioner has furnished most of the names of the women, and when I get that list I will supplement that with the men's names out of the various cards.

The Court: From that what do you do, that is, where you make up the 800?

The Witness: That is where we send out the questionnaires.

Q. (By Mr. Margolis): Maybe we can get at it quite clearly this way. I would like to have you tell me, beginning from the very start of the process, how the 855 names were selected, from what sources and by whom, which were put into the master jury box in January of 1947.

(Testimony of Edmund L. Smith.)

A. The jury commissioner and the clerk placed the names in the box, as I have stated, from a list furnished by the jury commissioner of women and perhaps some men selected at random from the 25,000 or 30,000. All of these to whom were sent questionnaires——

The Court: I am a little confused, Mr. Smith. I had understood a while ago that when the jury commissioner hands you a list of names those names are processed and eventuate in a questionnaire and a card in your available box and that when you go to draw the 800, or whatever number it is, all that 800 are drawn by you and the commissioner from the available box at random?

The Witness: No, that is a misunderstanding. I didn't say that.

The Court: Well, I had understood that this morning and this afternoon. Will you straighten me out on that?

Mr. Margolis: I wonder if we could take it step by step.

The Court: Very well.

Q. (By Mr. Margolis): You receive an order by the senior judge to place 500 or more names into the master box in accordance with Exhibit A or a similar order? A. Yes.

Q. What is the first thing that you and the jury commissioner do after receiving that order, and trace step by step what you do in order to finally get those names into the master box?

A. I will have to go back of the order because the names are processed prior to that order.

(Testimony of Edmund L. Smith.)

Q. Then go back as far as you think is necessary and give us step by step how those names got into the box.

A. The jury commissioner will give me a list and, as I say, he has furnished practically all of the women in greater percentage, and questionnaires are sent to those.

Q. And men who may be on the list?

A. Possibly. But I will supplement that with names drawn from this available box of men. I haven't come to the stage yet of going back and taking women out of that box because it is such a short period.

Q. Because you didn't start using women until 1943 and you don't put them in there for five years?

A. That is correct.

Q. Now if you don't mind my interrupting you, so we [96] can get the details as we go along, when you get a list from the jury commissioner is there any specified number on that list?

A. No.

Q. Just a list that he gives you?

A. Yes.

Q. Is there any specified time when he gives you the list?

A. No.

Q. Just from time to time he will give you a list, is that right?

A. Yes, that is correct.

Q. Now let's assume that he gives you a list of 200. Does he sometimes give you a list of that many?

A. Or a thousand.

Q. All right. He gives you a list of a thousand. How many names will you then draw from the

(Testimony of Edmund L. Smith.)

25,000 to 30,000 cards to supplement the list of a thousand which he has given you?

A. If he has a thousand women I would perhaps draw an approximate number of men to send questionnaires to.

Q. Do you send questionnaires each time that you send out questionnaires, do 50 per cent of the questionnaires go to women and 50 per cent to men?

A. Oh, no.

Q. You receive the questionnaire—you receive the [97] list from him. You see that it has so many women and so many men. Say it has 900 women and 100 men.

The Court: Pardon me, counsel. Have you one of the lists that the jury commissioner has given you?

The Witness: I may have filed one of them. We don't use the list after we receive questionnaires.

* * *

Q. (By Mr. Margolis): Mr. Smith, I understand that you have some corrections to make with regard to the exhibits, the questionnaires that were introduced as exhibits earlier this afternoon.

A. I have learned that the category of questionnaires [98] marked Defendants' Exhibit K-3 are the questionnaires of jurors actually and heretofore impaneled and now subject to call in service at the present time.

Q. That would include those who were impaneled on February 3rd and those who were impaneled on February 17th?

A. That is correct.

(Testimony of Edmund L. Smith.)

Q. Now it is true, however, is it not, Mr. Smith, that at the time that these questionnaires were turned over to myself or the people from my office for study, you had a separate list for grand jurors summoned—trial jurors, I should say, summoned to appear on February 17, 1947, and these two lists of February 3 and February 17 panels have not yet been combined?

A. Yes. These are the ones that are impaneled.

The Court: I understood that the tickets are combined and are in your drawing box now.

The Witness: That is correct.

Q. (By Mr. Margolis): There were a group of jurors impaneled on February 17, 1947. That is this last one?

A. Yes. And they were not segregated at the time you had them.

Q. At the time we had them there was a group of questionnaires which were headed "summoned to appear on February 17, 1947," isn't that so?

A. That I didn't see.

Q. Mr. Hansen would know about that?

A. Yes.

Q. In any event, since yesterday the arrangement of the questionnaires has been changed because you have had a group of jurors impaneled yesterday?

A. That is correct.

Q. Are there any corrections to be made with regard to K-1 and K-2, Mr. Smith?

A. Not corrections. Those are excused and, as I stated before, those excused and not appearing for some reason.

(Testimony of Edmund L. Smith.)

Q. Which is K-1?

A. K-1 appears to be those that are already excused and some who did not respond to the summons.

Q. The same is true of K-2?

A. K-2 appears to be those who are excused.

Q. Now you have brought in four additional bundles of questionnaires, the first of which is headed "alphabetical list, women questionnaires, women in alphabetical order A to Z inclusive," the second of which is headed "men, A to H inclusive," and the third "men, I to O inclusive," and the fourth "men, P to Z inclusive." Can you tell what those are?

A. Those are the questionnaires of prospective jurors remaining in the master box.

Q. That is the balance of the 855 placed in the master [100] box in January 1947 who have not been drawn out for one of these panels?

A. That is correct.

Mr. Margolis: I offer that in evidence, if your Honor please.

The Court: Put them all in one batch. Are the 250 taken out? You said you were calling 250 for March 1st. Have you sent that venire to the Marshal yet?

The Witness: That venire has gone to the Marshal.

The Court: Are those 250 in there?

The Witness: Yes. They haven't been segregated.

(Testimony of Edmund L. Smith.)

The Court: They will be marked L-1, 2, 3 and 4 in evidence.

(The questionnaires referred to were received in evidence and marked Defendants' Exhibits L-1, L-2, L-3 and L-4.)

Q. (By Mr. Margolis): Now, did you find a list of proposed jurors which have been submitted to you by Mr. Hansen?

A. By Mr. Brown you mean?

Q. By Mr. Brown. Excuse me.

A. Yes. I found at haphazard a few.

Q. You have handed me three lists, the first one of which appears to have 69 names and it says "questionnaires mailed 11/8/45." Does that indicate to you that the list was given to you shortly before 11/8/45? [101] A. Yes, it does.

Q. I notice that this list of 69 is composed entirely of women.

A. I found one man. There is a man who lives at the Jonathan Club. That is what called my attention to it. I wondered how a woman could be at the Jonathan club.

Q. So there are 68 women and one man on that list submitted to you by Mr. Brown on November 8, 1945? A. Sometime prior to that.

Q. Yes.

The Court: Sometime, meaning shortly?

The Witness: Well, it might have been a month or two.

Q. (By Mr. Margolis): When you received that particular list—

(Testimony of Edmund L. Smith.)

I think it might be well, your Honor, to have this marked so we will know what we are referring to. I will offer this list, which is headed "questionnaires mailed 11/8/45," with 69 names on it as Defendants' exhibit next in order.

The Clerk: M.

The Court: In evidence.

(The questionnaires referred to were received in evidence and marked Defendants' Exhibit M.)

Q. (By Mr. Margolis): Now, referring to Defendants' Exhibit M, which you received within a month or two of November 8, 1945, when [102] you received that Exhibit M what did you do with it?

A. Handed it to a clerk for the typing of envelopes—first to mark the mailing zone numbers after the addresses, and then to type up envelopes for mailing questionnaires.

Q. At the time those questionnaires were mailed on November 8, 1945, as shown by Exhibit M, were other questionnaires mailed out to other persons also?

A. There undoubtedly were but I can't say how many, or when they were mailed.

Q. Referring now to your practice, if you received a list, let us say, such as this of 69 persons from Mr. Brown, you would then go to the 25,000 or 30,000 cards that you have and select a number of names from those cards, is that correct?

(Testimony of Edmund L. Smith.)

A. Yes. I might have had them already segregated, the names that hadn't served at that time since 1940 or '41.

The Court: An equivalent number?

The Witness: No, for mailing out questionnaires. We never count them except by—as I remember, during that time we had mailed approximately 6000 questionnaires.

The Court: During what time?

The Witness: The year prior to November 1945.

Q. (By Mr. Margolis): You mean over the course of that year? A. Yes. [103]

Q. Was there any system at all followed with regard to the number of names that you had obtained from the cards when you received the list from Mr. Brown?

A. No other than the names that had been selected of those who have not served, as I stated, since approximately 1940.

Q. I understand that, but I mean, was there any way of balancing off the two lists, would you take less of one or more of the other, or was it just simply absolutely at random?

A. It was at random in mailing out the questionnaires and also when the questionnaires are returned it becomes a matter of clerical work and just how many women get processed for the time to put the names in the boxes. We have a limit on getting the venires to the Marshal within at least a month or so prior to the return dates.

(Testimony of Edmund L. Smith.)

Q. Maybe we can get at it this way: Do you know how many questionnaires were mailed out during the year 1946? A. No, I do not.

Q. Do you have any record which would indicate that? A. No record.

The Court: Mr. Clerk, these 855 names that are in this master box now are on tickets, aren't they?

The Witness: That is correct.

The Court: And they are typed on a ticket, aren't they?

The Witness: That is correct. [104]

The Court: They were typed there by somebody from some card or list?

The Witness: From a card.

The Court: From a card?

The Witness: Yes.

The Court: Where did those cards come from, did they come out of that available box of 25,000 or 30,000?

The Witness: Some of them.

The Court: Where did the others come from?

The Witness: From the list furnished by the jury commissioner.

The Court: Doesn't the jury commissioner's list get into that available box?

The Witness: Well, the questionnaires that are returned from that list, the cards are made up.

The Court: Then they go into the box?

The Witness: Yes, but cards are not made up when they are mailed out from those lists, not until the questionnaires are returned.

(Testimony of Edmund L. Smith.)

The Court: I understand that. Forget all about the questionnaire. Somebody typed those little tickets in that box and they typed them from cards?

The Witness: That is correct.

The Court: Where did the cards come from physically? Where were they taken from? [105]

The Witness: Some from the lists, questionnaires and lists that the jury commissioner furnished.

The Court: No, no. That is where you made the cards up from, isn't it?

The Witness: Yes.

The Court: But where did the cards come from?

The Witness: Out of the available box, some of them.

The Court: Where did the rest of them come from?

The Witness: I take those out—the cards that are already made out which are taken out of the available box, of course there is no necessity, the questionnaires are matched up with that card, then the remaining questionnaires we have to type cards from and those are the names submitted by the jury commissioner, new names submitted by the jury commissioner.

The Court: Then the 855 names that went into that master box did not come out of your available box?

The Witness: Some of them.

The Court: Some of them did?

The Witness: Yes.

(Testimony of Edmund L. Smith.)

The Court: And the others came from these lists without going through the available box?

The Witness: That is right.

The Court: Where do you keep the cards? When did you put those cards in the available box? [106]

The Witness: After they are used the names are placed in the box. Then I have a drawer of these cards that match the tickets in the master box. This is put into the box, the names that are in the box matched with the tickets in the box.

The Court: You have a packet of cards in your hands. What are those, the 855 cards?

The Witness: No, these are petit jury venires drawn for the February term of 1946.

The Court: I still want to get back to this other system and method that you now have. It is not clear to me.

This last list, 11/8/45, did all of those names go into the 855?

The Witness: No, I can't say that.

The Court: Where did they go?

The Witness: They couldn't have gone in here—only those from whom questionnaires were received.

The Court: From all those you received questionnaires from?

The Witness: Yes, and maybe some questionnaires are still out.

The Court: But all those you did get questionnaires back on, every one of those went into the master box forthwith?

(Testimony of Edmund L. Smith.)

The Witness: I can't say because it is never checked with this list. It never has been checked. We haven't got [107] the time.

The Court: The questionnaires are sent out and get back and then you make a card from the questionnaires, is that right?

The Witness: That is right.

The Court: But you don't put that card in the available box?

The Witness: Not physically; no.

The Court: That is the jury commissioner box, is it? Has he a separate list?

The Witness: No. We hold those out and make tickets from those cards.

The Court: Then you make tickets from the cards?

The Witness: Yes.

The Court: Then when did you draw the tickets? Do you draw up tickets or do you draw from the cards in the box?

The Witness: I make up the cards from the questionnaires, and make up the tickets from the cards.

The Court: All at the same time, I mean, in the process?

The Witness: One clerk might make the cards and another clerk might type the tickets.

The Court: Well, I mean it is all a continuous process?

The Witness: A continuous process.

(Testimony of Edmund L. Smith.)

The Court: So that when you get ready to fill the box with 855 names you have the tickets already made out?

The Witness: Yes, before I call the jury commissioner [108] down to come down and put the names in.

The Court: Then you don't actually pick the 855 from a card, you pick it from a ticket?

The Witness: A ticket placed in the box; yes.

The Court: Then you have 25,000 or 30,000 tickets?

The Witness: Cards. Tickets are made up from the cards.

The Court: How many tickets have you got?

The Witness: Well, there were 855 tickets placed in there, and that is all the tickets we had at that time. There were no other tickets except what was being used in the courts prior and during the January and December months of the September term.

The Court: You have two other lists there that the jury commissioner submitted?

The Witness: Yes.

The Court: When were they submitted?

The Witness: One of them was received December 16, 1945, and the other one was received August 23, 1946. These are just picked out at random. They are not all the lists of the names submitted during those years.

The Court: In this process of the physical act which you and the commissioner engage in when

(Testimony of Edmund L. Smith.)

you put in one name and he puts in one name, where do you get those from? Where did you pick them from, you? Did you pick those out of the available box?

The Witness: The cards or the tickets?

The Court: I don't know what you pick.

The Witness: The tickets are made from the cards.

The Court: I know, but those are not made until you find out the people you are going to put in the box?

The Witness: That is right.

The Court: All right.

The Witness: Then the tickets are compared.

The Court: Wait, now. You pick your card out of the available box, is that right?

The Witness: Some of them.

The Court: Where did you pick the rest of them?

The Witness: It is typed up from these questionnaires but we do not have cards on the lists of new names submitted by the jury commissioner.

The Court: Where did the commissioner pick his card from? Does he pick a card? Doesn't he put a name in the box?

The Witness: No, he doesn't pick a card. We abandon the cards when the tickets are made and prepared and we know that we have cards and questionnaires for these tickets that we are going to place in the box, and the commissioner will grab up a handful and I will grab up a handful.

(Testimony of Edmund L. Smith.)

The Court: Handful of what?

The Witness: Tickets with just the names on them. He [110] will put one name in and I will put in another name alternately until we put the 855 or whatever number it is.

The Court: Then you pick the 855 cards from which the tickets are made? You choose those cards, is that correct?

The Witness: It is done as I explained from the questionnaires.

The Court: No, no. Who chooses those names? Who made up the list of 855 names that finally went in that box?

The Witness: There wasn't any list made up. It was made up from the cards.

The Court: Then who decided what names were going to be on that 855 list of names?

The Witness: The jury commissioner and I.

The Court: When did you do it?

The Witness: December 20, 1946.

The Court: Did the two of you consult?

The Witness: On January 2, 1947.

The Court: Did the two of you consult on those names?

The Witness: Yes. That is when the questionnaires came in. We sat down together after I had the tickets and cards all made out and I said, "Here are the questionnaires, here are the cards and here are the tickets."

The Court: That is for 855 names?

The Witness: Yes.

(Testimony of Edmund L. Smith.)

The Court: Where did you get the 855 names? Did you [111] choose the 855 names? Can you lead me out of this, Mr. Calverley?

Mr. Calverley: If the Court please, I might interrupt and clear this up.

Q. Mr. Smith, in picking up the 855 names, is it true that you pick your name, the names that you submit from the cards that are in the available box, is that right?

The Court: I asked him that and he said some of them.

The Witness: Some of them.

Q. (By Mr. Calverley): Where did you get the rest of them, from the cards in the reserve files that are not in the available box but are in the reserve file, the 25,000 or 30,000 names?

A. From the cards made up from the questionnaires.

Q. Aren't those the ones that Mr. Brown submits, not your names but Mr. Brown's names, the ones that are on that list? A. Yes.

Q. In other words, when you say some of them you mean you get all of the names you submit from the cards from the available box, isn't that right?

A. Some of them. I have stated in my affidavit that I have handled this—I can't say exactly when—but of the names submitted by jurors who should be in that affidavit, by the way, who were excused or disqualified, when they come in [112] and say, "My wife is able to serve, she is qualified," we send her a questionnaire. He will leave her name and

(Testimony of Edmund L. Smith.)

address and I will send her a questionnaire. Then there are some colored people, Chinese——

Q. You get the names you submit for placement in the master box, you get those from the cards in the available box and from certain lists of your own, is that right? A. That is correct.

Q. And Mr. Brown submits a list of his own which is not in any box as yet?

A. That is correct.

Q. And then questionnaires come back from that list, and taking those names that Mr. Brown submits that have responded to the questionnaire and are qualified and from the cards that you draw from the available box and from your own list, and a combination of those they make up the 855, is that right?

A. That is right. The mechanics of doing that is when the questionnaires returned from all of these sources have lists and cards and the available box, which I select and which the jury commissioner selects, then those cards which I already have and are selected for names to be placed in the box, they are compared with the questionnaires which have been placed in alphabetical order, and when we run across a name the card is drawn out, that questionnaire is set aside [113] because we already have a card for that questionnaire, and when we get a questionnaire that we do not have any card already made up for, then those remaining cards are typed for them.

(Testimony of Edmund L. Smith.)

Q. Is it true that the names that Mr. Brown submits and who respond to the questionnaires, that they eventually get into the available box or the reserve file?

A. Yes, after they are used.

Q. After they are used they eventually get in there?

A. Yes. The first place these cards go, when the tickets are placed in the master box the cards go into the drawer marked "names in box."

Q. Then is it true that when you and Mr. Brown select these tickets alternately that you put in the box those tickets which include names that have been supplied by you from the cards in the available box, and from your own list and names supplied by Mr. Brown from his list who have responded to the questionnaire?

A. That is correct.

Mr. Calverley: That is all, your Honor.

Mr. Margolis: Shall I proceed, your Honor?

The Court: Well, I don't know. I still do not understand it.

Mr. Margolis: I have a little difficulty too, your Honor. [114]

The Court: Now let me see. Before recess you were going to go out and get the last list that Mr. Brown submitted.

The Witness: Well, I don't know whether it is the last list or not. You asked for some list.

The Court: You have a list there. Now I don't know yet when those get into the available box. You

(Testimony of Edmund L. Smith.)

say they get in after they are used. What do you mean after they are used?

The Witness: Where the questionnaires are returned from these lists, then from other sources.

The Court: Not from the other sources, just from this list.

The Witness: All right. These are new names. They are checked with the names in the box and in the available box for duplicates.

The Court: Then you make a card out from the questionnaire?

The Witness: The questionnaires are first arranged in alphabetical order, the ones that are received up to that time or that have been placed in alphabetical order. We only work with that bunch.

Then the cards are typed, as I indicated before, where there are no cards, or any names coming off of this list there would be a card typed up from the questionnaire.

The Court: Then where would the card go?

The Witness: It would be held in abeyance until the jury commissioner and I met and put the names in the box.

The Court: You put the names in the available box?

The Witness: Put the names in the master box.

The Court: In the master box?

The Witness: Yes. The only place where the jury commissioner and clerk place names is in the master box.

(Testimony of Edmund L. Smith.)

The Court: So that what you do is to perform the clerical processing of the names submitted by the commissioner?

The Witness: That is correct.

The Court: His cards and questionnaires are kept separately or just the cards from your cards?

The Witness: No. They are commingled in alphabetical order.

The Court: Commingled in alphabetical order?

The Witness: Before the tickets are typed.

The Court: Before the tickets are typed?

The Witness: That is right. There are no tickets for those cards, for none of them, because when we are through with the tickets during the term, until the end of the term, the tickets are discarded and new tickets are made up for all of the cards at each time the jury commissioner and the clerk place the names in the box.

The Court: So that the 855 names that were selected were names for the January jury—the 855 we are talking about now—were names half of them submitted by the commissioner [117] without regard to your available file and half of them by you, is that correct?

The Witness: I couldn't say that they were 50 and 50 per cent, or 20 and 80 per cent, or 40 and 60 per cent.

The Court: How do you explain the alternate depositing in the box of names?

The Witness: We sit down with the tickets, and, as I say, he puts half of the tickets in and I

(Testimony of Edmund L. Smith.)

put half of the tickets in no matter from what source, but if there is a name that comes up and the commissioner thinks it is deceased, or happens to be incompetent or otherwise, we will set it aside.

The Court: Now when is the determination made about the 855 names, by the order of the court?

The Witness: To place them in the box?

The Court: To draw 855 names. That is not decided until the court makes its order?

The Witness: No, the order reads, the exhibit here in the record reads, that the clerk and jury commissioner shall empty the box and place therein not less than 300 or 500 names.

The Court: Not less than 500 names of citizens?

The Witness: Yes.

The Court: Well, then, if I understand you correctly, you have no way of knowing, and there is no way of telling, of the 855 names in the box for the current term how many of [117] those names were originally submitted by the commissioner and how many of them were submitted by you through other sources?

The Witness: There is no way of telling.

Mr. Margolis: I wonder if I could ask a question along those lines?

Q. I notice on those lists furnished you by the commissioner, with almost no exceptions the names were those of women. There might be one exception in 100 or 200. That is right, isn't it?

A. Oh, no. Here is a list that is all men.

(Testimony of Edmund L. Smith.)

Q. He also submits lists of men to you?

A. Yes, from time to time. There are over a thousand there. They must have counted them when they ran them off.

The Court: Let me get another thing straight now. The cards made up on those lists submitted by him do not go into your so-called available drawer until after they have been put into a box and chosen on a panel, is that correct?

The Witness: That is correct; or excused.

The Court: I understand. So that there is no commingling in your available box of the names submitted by the commissioner and yourself until after the names submitted by him have served?

The Witness: That is right, on new names.

The Court: On new names?

The Witness: Yes. [118]

Q. (By Mr. Margolis): Mr. Smith, when was the last time that you picked a group of cards out of the 25,000 or 30,000 cards that you refer to?

A. Recently. I can't remember how long ago it has been.

Q. Within the last month or two? A. Yes.

Q. At that time how many cards did you pick out of those 25,000 or 30,000 cards?

A. I didn't get through the alphabet and I imagine that I am having prepared now for mailing perhaps, as near as I can recollect, between 1500 and 2000.

Q. And those were names selected by you in the last month or two? A. Yes.

(Testimony of Edmund L. Smith.)

Q. From 25,000 or 30,000 cards? A. Yes.

Q. Now how many times a year do you do that?

A. I couldn't say.

The Court: Several times?

The Witness: Might be.

Q. (By Mr. Margolis): Now when you mailed out these 1500 or 2000 questionnaires from cards out of the 25,000 or 30,000 cards, did you at the same time mail out cards from lists submitted to you by Mr. Brown? [119]

A. Approximately around the same time.

Q. How many did you mail out, how many questionnaires did you mail out for the list submitted by Mr. Brown at that time?

A. I don't know.

Q. Would you have that list? Could you tell us?

A. I couldn't tell you.

Q. Where is the list now, this very last list that you received from Mr. Brown? Where would it be?

A. Well, one of these might be it. Let's see. August 23, 1946. That might be the last list.

Q. And that is a list of a little over 1000?

A. Yes.

Q. So according to the best of your recollection, at the time when you mailed out questionnaires to a few more than a thousand people on lists submitted by Mr. Brown, you mailed questionnaires to somewhere between 1500 and 2000 people from cards selected from the 25,000 or 30,000 cards you have referred to?

(Testimony of Edmund L. Smith.)

A. Well, there must be another list—oh, here they are. This was received, 500 women.

The Court: For the sake of the record, let's mark those *so will* know what they are.

Mr. Margolis: Let's identify them for the record. [120]

For Exhibit N we have marked a list with the number "500" at the top and marked "received 12/16/45."

The Court: Admitted.

(The questionnaires referred to were received in evidence and marked Defendants' Exhibit N.)

The Court: Do you have some more there?

Mr. Margolis: The last to be marked, as Exhibit O, is a list with the number "1000 plus" at the top and "received 8/23/46."

(The questionnaires referred to were received in evidence and marked Defendants' Exhibit O.)

The Court: Then you have another one?

Mr. Margolis: That has already been marked as Exhibit M, your Honor.

The Court: Go ahead, counsel.

Q. (By Mr. Margolis): You were referring to Exhibit N. Now the questionnaires for Exhibit N were mailed on 9/26/46, is that correct?

A. That is correct.

(Testimony of Edmund L. Smith.)

Q. Now is that the approximate time that you mailed the last questionnaires from cards selected by you?

A. I don't believe there were any cards made at that time—I mean, cards drawn out of the available box at that time.

The Court: Mr. Smith, do you have any list submitted by [121] the commissioner there upon which you have made up cards which have not yet gone into the available drawer?

The Witness: I have perhaps several thousand questionnaires that haven't been gone over.

The Court: Of names submitted by the commissioner?

The Witness: Maybe both.

The Court: Let's just stick to the commissioner for a few minutes.

The Witness: Yes, I would say there are some names on his in there.

The Court: I understood you to say just a few moments ago that the cards for the names of the list submitted by the commissioner do not go into the available box until after they have served as jurors or been excused.

The Witness: That is correct.

The Court: Now do you have any such group of cards in your office at the present time?

The Witness: None.

The Court: They have all served as jurors and gone into the available file, is that correct?

The Witness: No.

(Testimony of Edmund L. Smith.)

The Court: Or are in the current file?

The Witness: That is correct.

The Court: In the current box?

The Witness: That is correct. [122]

Mr. Margolis: I still would like to get this one thing cleared up, if I can.

Q. At the present time you have drawn from the 25,000 or 30,000 cards about 1500 or 2000 cards and you are going to mail questionnaires to the persons whose names appear on those 1500 or 2000 cards? A. Yes.

Q. At the same time are you going to mail questionnaires to persons appearing on a list submitted by Mr. Brown?

A. Yes; that is approximately the same.

Q. Do you have that list? A. No.

Q. Do you expect to get that list in the near future, is that it? A. Yes.

Q. How many names will be on that list, do you know? A. No, I don't know.

Q. How many names are usually on those lists?

A. Various, as we have seen here. Here is a list with 1000 names, another with approximately 500, and one with 69 names on it.

Q. Do you know, with regard to Exhibits M, N and O, and the dates which appear thereon, when the questionnaires were sent out?

A. No, I do not except on Exhibit N where the clerk [123] who has mailed them has noted that the questionnaires were mailed on September 26, 1946.

(Testimony of Edmund L. Smith.)

Q. Let's stick to Exhibit N then. Do you know how many questionnaires were mailed altogether during that period? A. I do not.

Q. Do you know how many questionnaires were sent to persons whose names appeared on cards selected from the 25,000 or 30,000 cards at that time?

A. There were very few, very few.

Q. Do you know how many?

A. No, I don't.

Q. When you go through 25,000 or 30,000 cards for the purpose of selecting names, what method do you use in selecting cards which determines, first, which cards you will select and, second, how many cards you will select?

A. I kind of look for the date, alphabetically starting with the days, and I go through the cards haphazardly and pull out the first card I come to, say with a date 1940 on it, showing either excused or impaneled, with no date subsequent to 1940 or '41. I look primarily for that date, look at that date.

Q. Do you look for the date, just for the date 1940? A. Yes, or prior.

Q. Or prior? A. Yes. [124]

Q. In other words, you will pull out all cards of jurors who have either served or were excused prior to 1940 or during the year 1940 and who have not served since that time?

A. That is right, except I wouldn't say that I pull all of them, because I may miss some of them.

Q. But your purpose in going through is to pull all of them? A. Not all of them.

(Testimony of Edmund L. Smith.)

Q. How do you determine which of them you will pull and which of them you will not?

A. I go through the alphabet and approximately take some names from each letter of the alphabet.

Q. Let's say you come to the letter A, and let's say that there are 2500 cards of persons who have served, let's say a thousand cards of persons who have served during or prior to 1940, or were excused and haven't served since; how would you determine which of those 1000 cards from the letter A would select? A. Just chance.

Q. What do you mean by chance? Would you take the first few hundred you came to?

A. According to how much time I had.

Q. Well, you start with the letter A at the beginning and you will go as far as you have time to go through that letter taking out all of the cards as they appear of jurors who served or were excused in 1940 or prior thereto, and haven't served since then? [125] A. Not all of them.

Q. How do you determine which ones you do and which ones you do not pull out?

A. Just by chance.

Q. When you say just by chance, do you just shut your eyes and not look at the cards, or what do you do?

A. I said I looked at the date but I do not take—if I take four or five cards, I might jump four or five or I might jump ten.

(Testimony of Edmund L. Smith.)

Q. And you will take, if you were selecting cards, as you jump along you will take all of the cards? A. Only those cards——

Q. Only those cards dated 1940 or prior thereto?

A. That is right. I may by chance get in a card in '41 or '42.

Q. Now within the 855 that were put in the box in January 1947, do you have any idea how many or what the approximate percentage were that were selected from the 25,000 or 30,000 cards?

A. Very few.

Q. Do you have any idea?

A. No, because most of the cards for this present panel were mostly submitted by the jury commissioner and selected from those who had not served before. [126]

Q. Do you know how many were selected by the jury commissioner and how many by yourself?

A. No, but approximately all of them, the majority of them.

Q. When did you last select——

The Court: Majority of what?

The Witness: In answer to his question, the majority of the names were submitted by the jury commissioner.

The Court: That is, the majority of the 855 names?

The Witness: Yes.

On December 28 we put in 70 additional names, put in 567 first and I believe those 70 were all women.

(Testimony of Edmund L. Smith.)

Q. (By Mr. Margolis): The 70 additional names were all women, is that right? A. Yes.

Q. How about the 567?

A. They were both men and women.

Q. And they came from both sources, is that right?

A. No, the great majority of the women are submitted by the jury commissioner.

Q. But the 567 cards came from both sources, isn't that right?

A. Yes, with the qualification that very few came from the available box at that time. [127]

Q. How about during the year 1946?

A. That was, as evidenced here, perhaps 50 per cent from each source, the jury commissioner and the available cards.

Q. That is the ones from which the February 1946 grand jury were drawn?

A. That is correct.

Q. Now in your affidavit you say that in addition to selecting names from 25,000 or 30,000 cards, you have submitted names of wives of men selected for service who were disqualified?

A. That ought to be, excused or disqualified.

Q. Those would constitute a very, very small number, would they not?

A. Comparatively; yes.

Q. Just a few names here and there, is that right? A. Yes, that is right.

Q. And are those pretty much the situation where the husbands volunteered the services of their wives?

(Testimony of Edmund L. Smith.)

A. Well, they will give the name of their wife and say, "Well, the judge excused me but here is the name of my wife. She can serve."

Q. Where does the suggestion come from? Does it originate from you, "maybe your wife would like to serve?" or does it originate from the excused or disqualified juror? [128] A. Both.

Q. You sometimes suggest, "How about your wife," is that right?

A. Yes, and they sometimes submit the name.

Q. Now when does this occur? Does this occur at the time that the jury is being impaneled?

A. Oh, at various times.

Q. Do these people come in and talk to you and ask to be excused or disqualified?

A. Sometimes they come in and sign their pay voucher and sometimes when they are excused they will come into the clerk's office.

Q. What do they come in for when they are excused?

A. Sometimes to sign a pay voucher and sometimes the judge will excuse them and send them in there to notify the clerk.

The Court: To notify you?

The Witness: Yes.

The Court: To take them off the list?

The Witness: Yes.

Q. (By Mr. Margolis): How about disqualified jurors, do they come in in the same way?

A. Those who are excused for incompetency would be at the time or prior to the impanelment.

(Testimony of Edmund L. Smith.)

Q. And you excuse them for incompetency, is that right? A. What?

Q. Who excuses these people?

A. The Court is the only one who excuses them for incompetency or otherwise.

Q. You refer in your affidavit to furnishing lists of colored people. When did you furnish a list of colored people?

A. A year or two ago.

Q. How did you happen to furnish a list of colored people a year or two ago?

A. I asked the colored deputy in my office to—at the time we were getting names ready for the box—to get me a list of colored people.

Q. Did you tell him where to get the list or how to get it?

A. No, I thought he had sense enough to get it himself. I sent questionnaires out through him.

Q. Did you ask him to select a list from his friends or to go from house to house? How was he to get this list of colored people?

A. I didn't tell him.

Q. Just submit a list of colored people, is that what you told him? A. Yes. [130]

Q. How big a list did he submit?

A. Oh, there were several lists. They weren't very big lists.

Q. Ten, fifteen, twenty, fifty?

A. Something like that.

Q. Something like what?

(Testimony of Edmund L. Smith.)

A. There was one list I believe from a veterans organization, that is, he told me it came from a veterans organization.

The Court: How big was that list?

The Witness: I don't remember. There was one of them that had——

The Court: Do you have those lists?

The Witness: No. As I say, we discard the lists when the cards are made up and work only from the cards. We don't work from the lists.

The lists are never checked. We haven't the clerical help to do that. They are never checked to find out how many actually returned the questionnaire. That hasn't been done.

The Court: The only function that the list performs then is to be a mailing list for the questionnaires?

The Witness: That is right.

Q. (By Mr. Margolis): Do you know how many were on these lists of colored people? [131]

A. No, I don't.

Q. You don't have any idea?

A. I would say less than a hundred.

Q. On each of the lists?

A. No, altogether.

Q. When was the first time you got such a list and when was the last time?

A. I don't remember that. As I say, about a year or two ago was the last list.

Q. What was the reason for getting a special list of colored people?

(Testimony of Edmund L. Smith.)

A. I wanted some more names in the box.

Q. You felt that it wasn't necessary in 1946 and 1947, is that right?

A. The colored people were coming in then on the venires. The former clerk had placed colored people in the box.

Q. You say a former clerk had placed them?

A. Yes, my predecessor had placed colored people on the list that he obtained, the jury commissioner, and those were in the available box mixed up with all the others.

Q. Did you find that the lists submitted to you by Mr. Brown contained an average proportion of colored people?

A. Yes. I believe some of these lists contained colored people.

The Court: Can you tell by looking at the list?

The Witness: No.

The Court: How do you know they do?

The Witness: Only by my observation in the courtroom when they come in.

Q. (By Mr. Margolis): You didn't obtain an extra list for 1947, is that right? A. No.

Q. Did you obtain one for 1946.

A. I can't say whether any of those were in that box at that time or not. I believe they were.

Q. Do you know how many colored people there were in the group of 855? A. No, I do not.

Q. Do you have any idea? A. No, I don't.

Q. Were there more than two?

A. I am positive of that.

(Testimony of Edmund L. Smith.)

Q. Were there more than 10?

A. I wouldn't say as to that.

Q. Now you refer also in your affidavit to other lists. You say lists of colored people and others. What do you refer to by the word "others"?

A. From the lists that I have spoken of made up from time to time of jurors submitting their wives' names, and I [133] remember at one time, since the Chinese Nationality Act, I got up the names of some Chinese from the records in my office. I can't think of any others.

The Court: Naturalized Chinese?

The Witness: Both.

Q. (By Mr. Margolis): When you refer to certain records in your office, what were those records? A. Naturalization records.

Q. Then you got from those the list of Chinese, and that list was one of naturalized Chinese?

A. No, both naturalized and native-born.

Q. Where did you get the names of the native-born Chinese?

A. From the records in my office.

Q. What records?

A. The naturalization records, from the witnesses; not only the applicant himself but the witnesses too.

Q. Now are there any other lists that you refer to in your affidavit?

A. I can't think of any right now.

The Court: Mr. Smith, actually in the 25,000 or 30,000 names that you have in that box, as I

(Testimony of Edmund L. Smith.)

gather from your testimony, you have supplied a comparatively few of them.

The Witness: That is correct. [134]

The Court: Would you estimate that of the 25,000 or 30,000 names that you have supplied approximately 2000 or 3000, or more or less?

The Witness: Less.

The Court: Less than two or three thousand?

The Witness: Yes.

The Court: So that the 25,000 or 30,000 names as they are on the cards in your office at this time are these names that has been accumulated there and the ones that have been made up and added to by the jury commissioner from time to time?

The Witness: That is correct.

The Court: And previous clerks and previous jury commissioners?

The Witness: Yes, you see, I have two other divisions, two other jury commissioners.

The Court: Well, now, one thing I would like to ask—were you concluded?

Mr. Margolis: I had finished my questions, your Honor, unless there is something that you want to add.

The Court: I still want to go back to the situation we were discussing a while ago about these cards from the jury commissioner.

I understood you to say that these cards are not put into the available list until the persons have been called for [135] service on the jury and served or excused, is that right?

The Witness: That is correct.

(Testimony of Edmund L. Smith.)

The Court: From the list submitted by the jury commissioner?

The Witness: That is right.

The Court: And that you do not now have any segregated cards in that class in your office?

The Witness: There is a box of cards that haven't been mailed yet.

The Court: Haven't been mailed what?

The Witness: There was a mixup in the system. We had to get some names quickly and there are approximately—I stated before that there were no cards—I remember now there are approximately maybe a thousand cards or so, and I was not sure that questionnaires had not been mailed out. Envelopes had been typed and I haven't checked the envelopes to see whether they matched the cards or not.

The Court: Well, now, I understood you to also say that people who have served on the jury, their name does not go back into the available box for at least a year, is that right?

The Witness: At least two years at the minimum.

The Court: That is kept in a segregated file, is that right?

The Witness: It has been lately but not previously. [136] Previous to 1945 they went into the available box with all the others alphabetically under the one alphabet.

The Court: Previous to 1945?

The Witness: Yes.

(Testimony of Edmund L. Smith.)

The Court: Well, now, where are the women who served on the grand jury in 1946, the names of the women who served on the petit juries during 1946?

The Witness: Here are the ones that were drawn and the exhibit here of the grand jury of the 23 who served.

The Court: You mean the cards? Where are the cards segregated?

The Witness: Right there. The cards of the grand jury are in here as an exhibit, and the petit jury cards of the venire are here.

The Court: There are all the men and women?

The Witness: Men and women.

The Court: And those are taken now out of your box that you reserve for a year or two before you put back into your available box?

The Witness: These will go into that box.

The Court: That separate box?

The Witness: That is right.

The Court: I see. [137]

* * *

EDMUND L. SMITH

the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

* * *

The Court: Mr. Smith, did you bring with you all of the lists you had that were submitted by Mr. Brown, the commissioner?

(Testimony of Edmund L. Smith.)

The Witness: I have found some more lists. I wouldn't say that they are all; no.

The Court: You found some more?

The Witness: The lists are discarded and we don't use them after the cards have been typed.

The Court: What lists have you there? Will you identify them by time?

The Witness: The first list was—— [145]

The Court: Have you got them consecutively there?

The Witness: No.

The Court: Let's arrange them consecutively.

The Witness: Consecutively as to what?

The Court: Time.

The Witness: Time of what?

The Court: The present calendar we are using.

The Witness: Here is a list marked "questionnaires mailed 11/9/45 except red checked marked pages." All of the names were not used.

The Court: Have you got them arranged there as to dates?

The Witness: Here is another list "questionnaires mailed 11/16/45." That is later.

The other list doesn't show when the questionnaires were mailed.

The Court: Does it show when it was received or some approximate date?

The Witness: Later on, on July 30, 1945, there were 495 used and put in the box.

The Court: Just a minute. I see Mr. Brown is in the courtroom. Let me ask him a question.

(Testimony of Edmund L. Smith.)

If you take the stand, will you be able to advise when you submitted these lists? Do you have any record or memorandum of them?

Mr. Brown: Your Honor, how far back? [146]

The Court: Various lists, say the last two years.

Mr. Brown: Yes. I think perhaps I could but I would have to bring them in. I have some lists.

The Court: You have duplicates at home?

Mr. Brown: Not on all of them. Well, I might, but I don't know.

The Court: You can show the date they were submitted?

Mr. Brown: I think I could, if you don't take me back too far.

The Court: How far back?

Mr. Brown: I think two or three years.

The Court: That is plenty.

Mr. Brown: I will try to get them. I am not sure about it though.

The Court: Very well.

Just hand those lists to the Clerk and he will mark them. Designate them as to date and give them a number alphabetically according to their date.

The Clerk: The list dated May 11, 1944, will be Exhibit P.

(The list referred to was marked Defendants' Exhibit P and received in evidence.)

The Clerk: The list dated at the top, and also notation "put in box 7/30/45" will be Exhibit Q.

(Testimony of Edmund L. Smith.)

(The list referred to was received in evidence and marked Defendants' Exhibit Q.)

The Clerk: And the list marked "put in box 7/30/45," list of 390, will be Defendants' Exhibit R.

(The list referred to was received in evidence and marked Defendants' Exhibit R.)

The Clerk: And "1000 put in box 11/16/45" will be Defendants' Exhibit S.

(The list referred to was received in evidence and marked Defendants' Exhibit S.)

The Court: One of the exhibits yesterday was in November 1945 also I think, wasn't it?

The Clerk: December 16, 1945.

The Court: Here is one for 11/8/45. Let me see the December 16, 1945, and the 11/8/45.

(The documents referred to were passed to the Court.)

The Clerk: Here is a list which is Defendants' Exhibit R, "put 390 in the box 7/30/45," and "questionnaires mailed 11/8/45."

The Court: Now, Mr. Smith, you have heard these exhibits described. There is M, N, R and S which, from the records, would indicate that questionnaires were mailed in the latter part of 1945. Would your processing on them, that is, the questionnaires and the carding, and so forth, have been completed in time for these names to be part of the February 1946 master box? [148]

(Testimony of Edmund L. Smith.)

The Witness: Part of them would. As I say, we were limited by clerical help and only a portion of them would be processed.

The Court: Only a portion would have reached that stage where they could go into the master box where you select the name and the commissioner selects the name alternately?

The Witness: That is correct. At that time we placed 637 names in the box. That is all we had processed.

The Court: And all of those names of the 637 names came from these lists?

The Witness: No.

The Court: How many of those would you say came from these lists?

The Witness: From the cards that I had here and which are on the clerk's desk, I said that it indicates by those cards that perhaps 50 per cent had been called before and indicates that those cards came out of the same box.

Mr. Calverley: I think, your Honor, this batch of cards which are those drawn for the petit jury panel in 1946 should be introduced as an exhibit.

The Court: I thought they were.

Mr. Calverley: They were not, just the grand jury cards.

I will offer them as Plaintiff's Exhibit 1.

The Court: We will give them a defendants' letter. [149]

(Testimony of Edmund L. Smith.)

Mr. Margolis: No objection.

The Clerk: T.

(The documents referred to were received in evidence and marked Defendants' Exhibit T.)

The Court: These were just the petit jury and other batch of cards were the grand jury, and the two of them together do not make up the master box or the master list of 637 names?

The Witness: No, they do not because they were drawn out at that time on December 29, 1945, there were drawn 300 petit and 50 grand jurors, leaving a balance in the box of 287. There is no way to ascertain which names those 287 are.

The Court: From the method which you followed and your experience in putting these names in the box, would you be able to state **whether or** not, in your opinion, the remainder of the names—how many are there, did you say?

The Witness: 287.

The Court: —287 names would have been selected in the same manner as those cards indicated by Exhibit T?

The Witness: Yes.

The Court: They would be?

The Witness: They would be.

The Court: In other words, about half of your available file and the other half from currently submitted lists by the commissioner? [150]

The Witness: Approximately.

(Testimony of Edmund L. Smith.)

The Court: Very well.

Mr. Margolis: May I ask a few questions on the new exhibit?

The Court: All right.

Direct Examination

By Mr. Margolis:

Q. I want to refer to Exhibit R, Mr. Smith. I notice that that Exhibit R says "put 390 in 7/30/45, questionnaires mailed 7/9/45." Were the questionnaires mailed in this case after they were put in the box?

A. You didn't read all of it.

Q. "Except red checked marked pages." I wonder if you would explain what that means? I just want to find out what happened. When were the questionnaires mailed and when were they put in the box?

A. The questionnaires for the 390 put in box on July 30, 1945, must have been mailed prior to that time.

The Court: What your note means is that 397 names, or 390 names put in the box in July, that the questionnaires were mailed for the remainder in November, is that what you mean?

The Witness: That is correct, not the remainder, not all of them, no, only those of these pages that are checked in red. That is the clerk's check mark taking every two pages or [152] so, jumping here, because there are approximately 1175 names on there and we wouldn't have time to get them all out in time.

(Testimony of Edmund L. Smith.)

Q. (By Mr. Margolis): Let me see if I get the procedure correctly. When you get one of these lists you do not send out questionnaires simultaneously or even over a period of a week or two or three weeks to all of the persons on those lists?

A. No.

Q. You may send them out, some out one month and some out three, four, five months later, is that right? A. That is right.

Q. And then after the questionnaires come back, regardless of whether or not questionnaires have been sent out to other people on the list, you use or you may use all or part of those questionnaires for obtaining persons to put in the master box?

A. That is right.

Mr. Margolis: I have no further questions, your Honor.

The Court: All right, Mr. Calverley.

Cross-Examination

By Mr. Calverley:

Q. Mr. Smith, you testified yesterday to the effect that you maintained two boxes, which I believe you described as the No. 1 box or No. 2 box?

A. Yes.

Q. For which qualified prospective petit jurors are drawn? A. That is correct.

Q. Was that done pursuant to a court order?

A. Yes.

(Exhibiting document to counsel.)

The Court: Is this the order?

(Testimony of Edmund L. Smith.)

The Witness: Yes.

The Court: Have you finished with the order?

Mr. Garrett: Yes.

Mr. Calverley: If the Court please, we have a certified copy of the order.

The Court: Here it is.

The Witness: You have another one?

The Court: You have another one?

Mr. Calverley: Yes, your Honor. It is dated December 23, 1941, entitled "In the Matter of Order Governing Impanelment and Service of Trial Jury in Central Division of the Court."

We would like to offer this order into evidence, if the Court please.

The Court: Government's Exhibit No. 1. Admitted.

(The order referred to was received in evidence and marked Government's Exhibit No. 1.)

The Court: Since that order has been made, that is the procedure which has been followed?

The Witness: That is true.

Q. (By Mr. Calverley): Has there been any change since that order was made in the procedure followed as designated therein?

A. No change, except I might state this, that impanelment of this February 17th jury last Monday, instead of those names physically going into the box following this procedure, that panel was ordered to report in here for this case. That is a variation, but with that exception—

(Testimony of Edmund L. Smith.)

Q. I don't recall, Mr. Smith, if you testified yesterday to this fact or to this question, but I will ask it: What is your policy with reference to the length of time that you keep these questionnaires?

A. There is no policy.

Q. When did you usually destroy them or discard them?

A. I have just discovered that they are discarded apparently after a year or two after they are finished with them, those excused I did find those who had been impaneled [154] but I did not find those who had been excused.

Now some of those were used on subsequent panels, I am sure, and that is where the questionnaires may be. The others, I don't know where they are. They were discarded, used or destroyed, because we are not placing names in the box under the system now without sending out fresh questionnaires each time.

The Court: Each time?

The Witness: That is, before the names are placed in the box.

Q. (By Mr. Calverley): Now do you ever discard questionnaires before they have been processed in the way you have described here? A. Yes.

Q. When do you do that? Will you explain why?

A. Well, in placing them in alphabetical order, if the questionnaire doesn't show competency on the face of it, it would be discarded.

Q. You state that it would be discarded if it doesn't show competency on the fact of it. Where

(Testimony of Edmund L. Smith.)

do you look, or what guide do you follow, to determine competency?

A. We follow Section 411, Title 28 of the United States Code and pursuant thereto Section 198 and 199 of the Code of Civil Procedure of California.

Q. Now, if, in answer to the questionnaire a prospective [155] juror answers a question that indicates that he is incompetent under the sections you have mentioned, you discard that questionnaire, is that right?

A. Yes, if it shows on the fact of it.

Q. And the prospective juror's name does not go into the reserve file, which includes the available box which you have in your office, is that right?

A. No.

Q. Neither does his name go into the master box?

A. No.

Q. Now I have handed you Defendants' Exhibit B, I believe it is, which is a form of questionnaire used by your office, and I will direct your attention to question No. 5, which is: "Occupation or business." Do you pay any attention to the answer given to that question?

A. No. That was not placed in there by me or my office; it was placed in there at the direction of the Court. That was for the purpose of the use of the Court.

Q. You don't pay any attention to that question at all or to the answer given?

A. Not at all.

(Testimony of Edmund L. Smith.)

Q. If an individual fails to answer that question entirely, do you pay any attention to it?

A. No. Question 6: Are you a citizen of the United States?" If he says "no," we just throw it out. [156]

Q. Now can you state——

The Court: By virtue of the fact that he is disqualified under the statute?

The Witness: That is correct.

The Court: How do you determine whether they are incompetent or otherwise?

The Witness: In that way by answers to the questions.

The Court: Have you ever found anybody incompetent?

The Witness: Yes, lots of them.

The Court: What kind of an answer do they give, that is what I am trying to get at. How do you decide whether they are competent or incompetent from the answers they give?

The Witness: Question No. 6: "Are you a citizen of the United States?"

"No."

He is incompetent.

"Date of birth?"

"Born in 1935."

He is incompetent.

The Court: That is to say, that they are less than 21 years of age?

(Testimony of Edmund L. Smith.)

The Witness: That is correct. "Have you ever served as a juror?"

"Yes."

"If so, when?" [157]

"Within the last year."

He is incompetent.

"How long have you lived in the southern district of California?"

"One month."

He is incompetent.

The Court: Well, if their residence address, I suppose is outside of the state——

The Witness: If he sends back the questionnaire and gives his address as Wilwaukee, Wisconsin, he is incompetent.

If he states that he has given up his residence address here, he is incompetent.

The Court: Now in question 10, on exemptions, do you pay any attention to that?

The Witness: Yes. In connection with the date of birth, if a juror of ancient age states, in answer to question 10, "I am deaf in one ear and can't hear out of the other," that is presumptive that he is not in possession of his natural faculties under Section 198.

The Court: On any of the other stated grounds of exemption in the California Code, do you pay any attention to that?

The Witness: No.

The Court: Suppose a man says he is an embalmer or undertaker or preacher? [158]

(Testimony of Edmund L. Smith.)

The Witness: No, I don't think we have anything to do with that. That is up to the Court.

The Court: Well, you say you don't think you have anything to do with it. Do you pay any attention to it?

The Witness: No.

The Court: Regardless of what that answer is, unless it indicates that the person is decrepit or physically incompetent or he does not have an understanding of the English language, or has committed a felony or other high crime or misdemeanor, you pay no attention to the exemption?

The Witness: No, with some isolated instances. Now if it is called to my attention that he claims that he is a practicing attorney, and I see who it is, and it is called to my attention I wouldn't put his name in. And in one or two instances, in a few instances, where a prospective juror who is a woman has stated that she has small children of tender years, several of them, and she is alone with them, why in one or two instances I say we have left the names out.

The Court: Go ahead.

Q. (By Mr. Calverley): Is that the extent of your disregarding the questionnaires on the ground of incompetency?

A. Also where they stated, lots of times a questionnaire would reach a soldier or service man in the Navy or Army and he would state that he is in the service and not in the [159] district, we would disregard that questionnaire.

(Testimony of Edmund L. Smith.)

The Court: What if he said he was a policeman?

The Witness: No.

The Court: You would not disregard that?

The Witness: That is up to the judge.

The Court: What if he said he was an FBI agent assigned to the investigation of antitrust cases?

The Witness: Well, I have never seen any that I recollect.

Q. (By Mr. Calverley): Have you had instances in which a prospective juror has stated he doesn't understand the English language?

A. Yes.

Q. What would you do in case an individual made such a statement?

A. Put his name in the box and let the judge pass on it. If he answers the questionnaire he is of ordinary intelligence.

Q. Can you state whether or not the names that are in the reserve file in the availability box contains the names of individuals who reside in Los Angeles County?

A. I didn't get that question.

Mr. Calverley: Read it, Mr. Reporter.

(The question referred to was read by the reporter, as set forth above.) [160]

The Witness: Yes.

Q. (By Mr. Calverley): Do you have the names of residents of other counties in this district in that reserve file and which includes the availability box?

A. Yes, some of them.

(Testimony of Edmund L. Smith.)

Q. You testified yesterday that in selecting the names which go into the master box that you went through the reserve file, the availability box and jumped through the alphabet, picking out a number of cards at random through the file.

A. That is right.

Q. Did you follow any practice or policy with reference to the geographical location in which these various individuals lived whose names were pulled out of this source?

A. Yes. The order of court states the wording of the statute, Section 413, Title 28, which was first enacted in 1789, that at the direction of the Court from time to time the jurors shall be drawn from the portions of the districts so as to not unduly burden the citizens of one portion and not to incur unnecessary expense. We consider that in selecting in so far as we can.

The Court: That is, when you take names out of the available box?

The Witness: That is correct. [161]

Q. (By Mr. Calverley): Is it true that if you see there are too many names that are taken out from, say, the city of Glendale, you will put some of them back and try to find names from other locations?

A. Yes, some from Long Beach, and so forth. We try to get north, south, east and west as a general rule.

Q. Have you ever at any time, Mr. Smith, since you have been clerk of the District Court, thrown

(Testimony of Edmund L. Smith.)

out the questionnaire of any prospective juror or failed to make the card for him or thrown a card out of the reserve file, or the availability box, because the prospective juror indicated in his questionnaire or otherwise that he was a laborer working by the day or a member of a labor union?

A. No. I have had lots of them.

Q. Have you ever at any time thrown out the name of any prospective juror from your files or from the questionnaire who indicated that he was a Negro?

A. No. I have never seen a questionnaire that indicated what race or color he belonged to, that I recollect. When the questionnaires come back I don't pay any attention to the source, and it is not checked with the list or with the cards.

Q. Did you, in obtaining the lists that you testified to yesterday and which are referred to in your affidavit on file here of colored people, and I believe Chinese citizens [162] and possibly others, you didn't recall, did you ever direct that those lists be prepared on the basis of anyone's occupation or business?

A. No, never.

The Court: When you told Harry Beal to get a list of cards, did you tell him how many or did you tell him to get as many as he could get?

The Witness: As many as he could get. I like to have as many names as I can get every time.

Mr. Calverley: That is all, your Honor.

The Court: Further questions?

Mr. Margolis: Yes.

(Testimony of Edmund L. Smith.)

Redirect Examination

By Mr. Margolis:

Q. I am not sure that I understood you with regard to utilization of persons who live outside of Los Angeles County. You generally confine your selection to people who live within the county?

A. Most usually, in pursuance of that order.

Q. In other words, it is very rarely that you go outside the county, is that right?

A. Yes.

Q. Do you know of any instances in which you have gone outside the county?

A. Oh, yes. There have been from Santa Ana, San Bernardino, Riverside. [163]

Q. They are the rare exceptions, is that right?

A. I don't go that far because of the inhibition of the statute.

Q. You testified that with regard to the panel which was selected or ordered to report on February 17, 1947, that the usual practice was not followed and that instead of the names physically going into the box they were ordered in here directly. I wonder if you would explain a little more in detail, what you mean by that. Instead of physically going into what box?

A. In the box that is described in this order.

Mr. Calverley: Government's Exhibit 1.

Q. (By Mr. Margolis): Are you referring to the master box?

(Testimony of Edmund L. Smith.)

A. No, no. The names were in the first instance drawn from the master box. We are through with that. I am talking about these little tin boxes that the deputy has.

The Court: The alternate boxes?

The Witness: Yes.

The Court: That is where you have those who served and those who haven't served?

The Witness: That is correct.

Q. (By Mr. Margolis): The jurors were sent in here directly instead of their names? [164]

A. You see, there was an element of time. They were impaneled on Monday and supposed to be in here on Tuesday, so the Court just short-circuited the system and notified them right there to appear there instead of the clerk sending out notices, waiting for them to go home and then having to call them up by telephone, or otherwise. The Court simply directed that they report in court that morning.

Q. Was the entire panel so ordered to report?

A. I don't know.

Q. There was a panel of 200, was there not?

A. There was a venire of 200 drawn.

Q. Do you know how many were impaneled?

A. I stated yesterday approximately 70 perhaps were impaneled each time. In answer to the judge here I stated that with both panels we have working jurors now of between 100 and 150.

Q. How many jurors are ordinarily sent into a courtroom when a jury case is about to begin?

A. That is according to what the judge requests.

(Testimony of Edmund L. Smith.)

Q. How does it run? You have had experience as to how it runs.

A. Some 25, some 40. It depends on the case and the request of the judge and counsel.

The Court: I might observe for counsel's benefit that [165] in the trial of the Jehovah's Witness cases, for instance, there is rarely if ever a challenge made. They accept the first 12 in the box. In fact, in most cases the jurors are selected, I should say, from my experience, from a panel of not over 20, and less than that. In most of the criminal cases that are tried they accept the jury without challenge.

If a case has multiple defendants and multiple lawyers, so that there will be an indication that probably all of the challenges will be used, then the clerk of the judge calling it, calls enough jurors so that we will have enough.

Q. (By Mr. Margolis): Would you have any records which would show how many, whether the entire panel was sent in here or part of the panel?

A. Yes, I would. The calendar clerk has that record.

Q. Will you ascertain that for me and give me that information later on? A. Yes.

Q. Now you testified that you pay no attention to the occupation on the questionnaire. What do you mean by that, you don't even look at it?

A. I might see that but that isn't what I am looking for when I look at the questionnaire.

(Testimony of Edmund L. Smith.)

Q. Well, suppose you noticed that a person says he is an attorney, a practicing attorney at law.

A. I said, if it is called to my attention of a practicing attorney that I know is a practicing attorney, and who claims his exemption on that ground, why I would be inclined not to put his name in.

Q. Are there any other instances where that sort of thing occurs?

A. Only what I have stated.

Q. What about doctors?

A. I don't recollect testing out a doctor. I recollect of claims for exemption, or affidavits coming in to the judge and getting them afterwards, and the judge will send for the questionnaire, and I believe that that is where some of these questionnaires went. You spoke about 33 being missing.

Q. Yes.

A. Now I was talking with the calendar clerk and he says that the judge, when a person comes in sometimes to be excused, he will send in for the questionnaire and we never see it again. It is either in the judge's chambers or it may be in there.

Q. In other words, out of 855 questionnaires it is possible that the judge may have asked for as many as 33?

A. That is possible.

Q. Mr. Smith, then I would like to simply find out whether the entire panel was sent in here or

(Testimony of Edmund L. Smith.)

what portion of the panel and how the selection was made from the panel as to the jurors to be sent in here. [167]

The Court: I think it would be well to have it as a matter of record, but I should judge the whole panel was sent in here, judging from the number of people in the audience when I excused them.

Mr. Margolis: If that is the fact, I think it should be in the record.

The Court: I don't know, but that would be my guess.

Mr. Margolis: The witness has said he can ascertain the fact.

The Witness: Yes.

The Court: I would like to ask you a question.

Mr. Calverley asked you whether or not you had ever thrown a card out because a man indicated he was a working man. I have here a dictionary of occupational titles published by the United States Government, Department of Labor, in which the preface indicates that there are 29,999 different kinds of titles to jobs. Did you ever pay any attention to or throw out any card on account of any occupation, whether he was a laboring man or an employer or anything at all except for attorneys?

The Witness: I can't recollect of an instance. There was that woman that I spoke of, the woman that had little children, but there wasn't any occupation involved there.

The Court: All right. [168]

Mr. Calverley: Just one other question, if the Court please.

(Testimony of Edmund L. Smith.)

Recross-Examination

By Mr. Calverley:

Q. Did you ever systematically and intentionally throw out any names from the master box or from your files of prospective jurors because of the nature of their occupation, whatever the nature of it might have been.

A. Never.

Mr. Calverley: That is all.

The Court: Except attorneys where they claimed exemption as attorneys?

The Witness: Except attorneys where they claimed exemption.

The Court: Well, now, why did you turn out attorneys when they claimed exemption? We know that but I don't know that the Supreme Court would know that by the time this case gets there. So let's put that into the record.

The Witness: Well, he is not incompetent but my experience has been over the past 30 years or so that if the attorney claims his exemption he is generally excused, if he is practicing, especially in the court where he is drawn as a juror.

I wouldn't put his name in in the first place, but I wouldn't exclude as a systematic thing attorneys.

The Court: Now we are getting into the reasons why you take attorneys out, because they claim exemption. Let me ask you this question: Do you know of a lawyer who has ever been called and impaneled in the box where either side has failed to challenge him peremptorily?

(Testimony of Edmund L. Smith.)

The Witness: No. I have never seen a practicing attorney, and we have had many of them on the juries up here in the past years. I don't believe they trust each other.

Mr. Garrett: May I ask a few questions, if your Honor please?

The Court: Yes.

Redirect Examination

By Mr. Garrett:

Q. Mr. Smith, these 25,000 to 30,000 cards that are in your index, I think you said they represent jurors who have either served or been called for service in the past, is that right?

A. Yes. And there may be some that have never been called. That is, the name went into the box, it was left over, the card got into the available box when it was emptied, and they never have been called.

Q. And the jurors' cards which represent jurors who are now serving or called for service are on their way to that filing system and will be placed in there after a sufficient length of time has elapsed. so that they will be available again, is that right? [170]

A. Yes. The purpose of the questionnaire primarily was to weed out the chaff, the deceased, the moved out of the district, incompetent jurors, many of them become decrepit, not in possession of their natural faculties, and that may be determined by the clerk.

(Testimony of Edmund L. Smith.)

Q. That is why you send out that questionnaire even on those jurors whose names have been taken from your list of 25,000 to 30,000 cards, is that right?

A. That is correct.

Q. It is true, is it not, with respect to the jurors whose names are represented in those 25,000 or 30,000 cards that some have previously returned questionnaires?

A. I don't believe we have come to that yet.

Q. That would be true only after five years, is that correct?

A. Approximately; yes.

Q. When did you start using the questionnaires?

A. I believe about the time we started placing women's names in the box in 1943 or thereabouts.

The Court: It was following the Conference of Senior Circuit Judges in Washington, where they recommended the use of the questionnaire, did they not?

The Witness: That is correct. [171]

Q. (By Mr. Garrett): Now prior to the time that you started using the questionnaire the names were exclusively drawn from this list of 25,000 or 30,000 cards, were they not?

A. No, no. The same system was used more or less. The jury commissioner furnished the clerk with a list and from that list the cards, tickets, were made up and then were supplemented from the available drawer.

(Testimony of Edmund L. Smith.)

Q. That is what I am getting at. You say that some of those cards in your collection of 25,000 or 30,000 cards date back to 1925, is that correct?

A. I noticed in going through them, I saw one card there of a juror who had been called in 1925.

Q. So you have cards that were made at least that far back?

A. Yes.

Q. About how many of them?

A. I don't know.

The Court: Are there many or few?

The Witness: A few at this time. Most of those will be weeded out because the questionnaires are mailed, and a man that served 20 or 25 years ago we generally find he has become incompetent under the code.

Q. (By Mr. Garrett). Is it a fact that [172] for every one of those 25,000 to 30,000 cards there was originally a name on a list submitted to you by the jury commissioner?

A. I have only been clerk since 1942 and I can't testify to that.

Q. Were you familiar with the practice in the office prior to 1942?

A. More or less. It was the same situation. The clerk would obtain a list from the jury commissioner and the clerk would get a list from various sources, and from those lists the 25,000 or 30,000 have been compiled over the years.

The Court: I understood your statement yesterday in that regard, however, was that the 25,000 or

(Testimony of Edmund L. Smith.)

30,000 names, of that number that not over 2000 came from sources other than the commissioner.

The Witness: That I had to do with.

The Court: You would say then as far as you are concerned, not over 2000?

The Witness: Yes.

Q. (By Mr. Garrett): So that prior to 1943 the great majority of the names which eventually went into those 25,000 or 30,000 cards originally came to the attention of your office as names on lists submitted by the jury commissioner, is that a fair statement?

A. How far back are you going?

Q. I am talking now about the time prior to 1943. [173]

A. No, I would say it was made from lists of the clerk, my predecessors and the jury commissioner during those years.

Q. During those years, what was the method used for obtaining the names on the lists supplied by the clerk as opposed to those on the lists supplied by the jury commissioner?

A. I can't testify to that.

Q. Do you have any knowledge of those lists?

A. There wasn't any systematic—I can state this, from my observation, that there was no systematic method of obtaining lists.

Q. Speaking of the lists originated by the clerk as opposed to those supplied by the jury commissioners, were some of those names supplied by the various judges?

A. That I don't know.

(Testimony of Edmund L. Smith.)

Q. Now prior to the inception of the use of the questionnaires, what was done with the prospective juror after his name was furnished on a list before a card and a ticket was made up on him?

A. The list of names was checked with the cards in the drawers, both available and in the box for duplicates, and then the remainder, where there was a duplicate, the duplicates crossed off and the cards were made up.

Q. The cards were then made up?

A. Made up and tickets made from the cards.

Q. Now after the cards were made up [174] were the tickets immediately made up for use in the various jury boxes, or was there some investigation made as to the qualifications of the juror, the prospective juror?

A. There wasn't any.

The Court: There wasn't any investigation made?

The Witness: Not that I know of.

Q. (By Mr. Garrett): Under that system then, if a juror's name appeared on a list and was still on the list after the names appearing in your card index had been checked off that list, the first time you saw him or communicated with him was when you sent his name to the Marshal, is that correct?

A. The clerk never communicates with a venireman prior to the impanelment, unless he comes in for some purpose, an excuse or something like that, and then he is sent to the judge.

(Testimony of Edmund L. Smith.)

Q. You now communicate with the prospective juror, do you not, through the medium of this questionnaire?

A. That is correct.

Q. Now prior to the time you used that questionnaire, how did you find out whether or not a prospective juror whose name had been previously in your card index possessed what you deem to be the necessary qualifications?

A. There wasn't any method used. [175]

Q. Was there a system of personal interviews in use? A. No.

Q. By that I mean when they found from checking a list that the juror hadn't been called as a juror before, that is, the name on the list had not been called as a juror before, was the first time that juror knew that he was to report for jury duty when he was served by the United States Marshal?

A. That is my recollection.

The Court: All the matter of his qualification and disqualification, competence and incompetence, was determined by questions asked by the trial judge when they appeared in response to the subpoena?

The Witness? That is correct, in response to the summons.

* * *

Q. You keep no record of the questionnaires you send out, do you?

A. No.

(Testimony of Edmund L. Smith.)

Q. You use a list and you use a lot of cards but as soon as the questionnaires have been sent out you destroy that list and put the cards back in the files, is that right?

A. Yes. We work entirely from the cards from there on.

Q. So the appearance of a prospective juror is purely dependent upon his voluntary act in returning the questionnaire, is it not?

A. You call it voluntary or involuntary; yes.

Q. If a prospective juror doesn't return a questionnaire you never follow up to see why he didn't, do you?

A. We haven't had the clerical help to do that.

Q. It is a fact that there is no follow-up whatever used? [177]

A. We haven't used any; no.

Q. And having destroyed the lists and returned the cards to your files on which questionnaires are mailed out, you don't have any basis after that mailing for knowing which addresses have not returned their questionnaires, do you?

A. That is right.

Q. And you have utterly no basis, do you, of knowing what percentage of addresses have returned their questionnaires, do you?

A. No, only in a rough approximation.

Q. And then as soon as the questionnaires are reviewed, you immediately make the decision as to whether or not to make up a new card on them, if

(Testimony of Edmund L. Smith.)

you haven't got already a card, or to pull the card on the questionnaire for the making of the ticket, is that right?

A. Yes. The questionnaires are first arranged in alphabetical order, those that can be compiled and processed at that time, and then there may be other questionnaires coming in at the same time but we can't go back and fill in.

Q. Now you are the head of a large office and I know that your duties are heavy. You must have help from your assistants in the processing of those questionnaires, do you not?

A. That is correct.

Q. If it is the way it is in other offices, [178] and I presume it is in yours, the volume of that work of processing questionnaires requires the assistance of more than one of your assistants at various times?

A. That is true.

Q. And I take it that you don't have any particular assistants that you can assign to that work, so that when even one is processing the questionnaires it may be a different clerk or a different deputy clerk in any given time, is that correct?

A. That is correct.

Q. So that would it be fair to say that a considerable number of clerks in your office exercised from time to time the obligation of processing these returned questionnaires?

A. They do the clerical work.

Q. I see. I am not talking now about the mak-

(Testimony of Edmund L. Smith.)

ing up of the cards and tickets from these questionnaires, I am talking about the business of reading the answers.

A. Oh, no. They have nothing to do with the taking out of questionnaires or putting them in.

The Court: Who makes the decision as to whether or not a person is competent or incompetent? Do you delegate that to one of your deputy clerks?

The Witness: No. They may call my attention to something.

The Court: In other words, they will go [179] through the questionnaires and take a batch out and say, "Well, here is a fellow that was born last year, or three years, ago and is under age?"

The Witness: Or a practicing attorney.

The Court: Or a practicing attorney.

The Witness: Yes.

The Court: In other words, that decision is made by you in each case?

The Witness: And the jury commissioner. I will show them to the jury commissioner.

The Court: You also discuss that with the jury commissioner?

The Witness: Yes.

The Court: So that the two of you together make that decision and the deputy clerk does not make it?

The Witness: That is right.

Q. (By Mr. Garrett): Prior to the time that the processing is completed, are any cards or tickets made out on the basis of the questionnaire?

(Testimony of Edmund L. Smith.)

A. There have been in some instances, but I inaugurated the system of not making out new cards until the questionnaires have been returned, because it is a waste of material and a waste of time, because all of the questionnaires may not be returned. [180]

Q. I am not talking about making out cards and tickets before the questionnaires have been returned, as they might be from the jury's commissioner's lists; I am talking about the making out of cards and tickets on questionnaires that have been returned, while those questionnaires are being processed and before you have passed on them. That has been done in the past, has it not?

A. Oh, the clerks have arranged them in alphabetical order, yes.

Q. And they have made out cards and tickets on them during that process, have they not?

A. Not until we have passed on them.

Q. Now do the assistants that you use in the processing of those cards—I don't mean the work that is done on the master box that you have approved or disapproved—but during the processing of those questionnaires, prior to the time they come to you for approval, do your assistants use any system of marking on those questionnaires or any other record relating to the answers?

A. Some of the questionnaires get in to the judge several times and either his clerk or the bailiff had a method of marking with red pencil, or the judge himself marking "excused," and he was

(Testimony of Edmund L. Smith.)

thinking that those were the jurors that had been impaneled and were asking excuses, or the veniremen sent out and when I found that out why [181] I had those questionnaires all brought in and put in the alphabetical file of those who had not been processed. I think that is where some of those pencil marks on those questionnaires came from. And some of them were put on these after the venire was issued and the judge had sent in for the questionnaire, he would make red marks on there, or other marks.

Q. Can you recall any instance when your assistants have passed upon the qualifications of a prospective juror on the basis of their appraisal of the answers on the questionnaire?

A. No, I have never delegated that authority.

Q. Are there any instances in which your assistants have done that?

A. Not that I know of.

Q. Are there any instances in which the persons have placed grades on the questionnaires prior to your approval or disapproval?

The Court: Placed what?

Mr. Garrett: Grades, the valuations based upon the answers.

The Witness: Not that I know of.

Q. (By Mr. Garrett): Now with respect to the questionnaires themselves on the jurors whose names are not put into the master box, was there any procedure in effect concerning the preservation [181] or destruction of such questionnaires at the time you assumed your office, Mr. Smith?

(Testimony of Edmund L. Smith.)

A. No, no discussion about questionnaires at that time.

Q. I am talking about the ones for the jurors who are not accepted.

The Court: Did they send questionnaires before you became clerk?

The Witness: No, I don't believe so.

The Court: It was subsequent to the time you became clerk?

The Witness: Yes.

Mr. Garrett: I see.

The Court: By the way, what is the reference to that Conference of Senior Circuit Judges, do you know?

The Witness: No, I don't know what year it was in. I can look it up.

Q. (By Mr. Garrett): So the method of handling the questionnaires after they had been used and read originated while you were clerk, is that right?

A. I believe so. There was another system of mailing questionnaires with the summons and that was abandoned after one term.

Q. That was prior to the time you were clerk?

A. That I can't recollect. It might have been in 1942 or shortly prior thereto. [182]

Q. With respect to the questionnaires on jurors whose names do not get into the master box, the rejection of the prospective juror is usually made, I think you testified, by yourself in conference with the jury commissioner?

(Testimony of Edmund L. Smith.)

A. That is right. If we throw out any name, the jury commissioner—I will segregate those and show them to him, and if he takes any out why he puts them in the same category.

Q. As to the names, you take them up with the jury commissioner on the basis of the questionnaires rather than the names on the original list, do you not?

A. Yes. The questionnaires are never checked with the list nor are the cards checked.

Q. The original list in many cases has been thrown away at the time the questionnaire is returned?

A. Well, lost or misplaced because of non-use, never been used.

Q. Anyway, when you and the jury commissioner make your decision you have the questionnaire before you?

A. Yes.

Q. Now in case you and the jury commissioner both approve the juror represented by the questionnaire, the questionnaire is preserved, is that right?

A. Oh, yes. If the name goes in the box the questionnaire is preserved until that juror has completed service. [183]

Q. Those are the questionnaires that are here in evidence now, are they not?

A. That is true.

Q. Now when you and the jury commissioner look at a questionnaire and one or the other of you brings up an objection and there is agreement that

(Testimony of Edmund L. Smith.)

the objection is a good one, what do you then physically do with that questionnaire?

A. Put them in a pile and probably eventually throw them in the wastebasket.

Q. Has there ever been any system for the filing or preservation of those questionnaires representing rejected prospective jurors?

A. No, no.

Q. Have there been any cases in which those questionnaires have been preserved?

The Court: That is, those that are rejected by the clerk on the ground of obvious incompetency?

Mr. Garrett: That is correct, your Honor.

The Court: Not those that are rejected by the Court?

Mr. Garrett: Yes, I am referring, if your Honor please to this situation, where the rejection is made——

The Court: By the clerk and the commissioner on the ground of incompetency?

Mr. Garrett: ——at the time they have the questionnaire before them. Yes, your Honor. [184]

Is any endorsement made on the questionnaire of the rejected juror?

A. No.

Q. Have there been any instances?

A. Usually not.

Q. Have there been any instances in which questionnaires of such jurors so rejected have, for any reason, been preserved?

(Testimony of Edmund L. Smith.)

A. Not intentionally preserved, because if they are incompetent we don't want the card or any ticket or any possibility of getting them back into the box, and if there was a card that would be mostly preserved in what we call the leave-out box.

Q. But that would only be because there had been a clerical error and that it had not been taken out and destroyed, is that right?

A. Yes.

Q. The usual procedure is that when a questionnaire is decided upon adversely by you and the jury commissioner, if it is a name that came from one of the jury commissioner's lists, then there is no card on it and you don't have to do anything further, is that right, with respect to any card?

A. Yes, if there is no card made up.

Q. But if it is a name that came from your card index, then the usual procedure is, upon the rejection, to take that card out of your index and destroy it? [185]

A. That should be done; yes.

Q. But sometimes it isn't?

A. That is right.

Q. I have one other question—I don't know whether it has been asked before but if it has I will ask leave to ask it again—have you got in your office or under your control any questionnaires returned by prospective jurors, which jurors have been rejected and their names not placed in the box?

A. There may be, but——

(Testimony of Edmund L. Smith.)

The Court: You are still speaking of those rejected by the clerk and the commissioner on the ground of incompetency?

Mr. Garrett: Yes, your Honor.

The Witness: There is no way of telling because I have a lot of questionnaires that I just laid aside that haven't been processed, and which are in the process of mailing other questionnaires out now.

The Court: If they haven't been processed then you wouldn't have determined that they were incompetent, would you?

The Witness: No.

The Court: Then the answer to his question is no, isn't it, that you don't have of those who have been rejected by you and the commissioner on the ground of incompetency? [186]

The Witness: I don't believe so unless they are mixed in. There might be some that got back into the questionnaires that haven't been used. That is a possibility.

The Court: If that is the case, that is not by design, is it?

The Witness: No, no.

Mr. Garrett: No further questions.

The Court: Mr. Clerk, one of the grounds of disqualification of a juror is conviction of malfeasance in office or other felony or other high crime. I notice you have no question on there that indicates that.

The Witness: I have had in the past, I recollect now.

(Testimony of Edmund L. Smith.)

The Court: Is there any reason why you have not indicated a special question on that?

The Witness: I don't know. This questionnaire was gotten up by the Court.

The Court: All right. Is there any way that you undertake to determine that?

The Witness: No, unless, as I have seen on a questionnaire, included in an answer to the other questions of incompetency, if it is shown on its face that the prospective juror was incompetent, for instance, claimed exemption, I have seen there a statement by a prospective juror that he had been convicted of drunk driving two or three times, or some felony, and stated it as an exemption or an excuse.

The Court: What do you do with that? [188]

The Witness: If he made such a statement we would throw the questionnaire out if it came to my attention.

The Court: That is, you conclude that that is incompetence and his name is not included?

The Witness: Yes, under Section 199.

The Court: Do you make a systematic call upon the Federal Bureau of Investigation and their fingerprint department to determine whether or not they have any identification of these persons?

The Witness: No.

The Court: Nor of any other recording agency?

The Witness: No.

The Court: Is that ascertained by question of the judge at the time of impanelment?

(Testimony of Edmund L. Smith.)

The Witness: At the time of impanelment in open court, I have heard the judge state many, many times, that the disqualifications for incompetency of a juror, and of course he will elaborate that if any have been convicted of serious crime they not indicate it there in open court but to inform the judge in chambers of such before he is ever impaneled in the case, instead of being a serious matter if it wasn't revealed.

The Court: Do you have some more questions?

Mr. Calverley: Just one. [189]

Recross-Examination

By Mr. Calverley:

Q. Can you state, Mr. Smith, approximately what percentage of the questionnaires that have been mailed out have been returned within the past two years?

A. I only recollect that at one time—and I believe it was in the years '44 and '45—that one time we estimated we had mailed out between 5000 and 6000 questionnaires and at that time we had only returned about 1800.

Q. Do you have any other figures as to the approximate number of questionnaires returned other than your estimate that you have just indicated?

A. Only a chart that was sent out by the director of the administrative office of the records in the courts in the District of Columbia, and my observation of them was that the proportions and percentages of the returns were approximately what he had been getting here.

(Testimony of Edmund L. Smith.)

The Witness: Well, I would say from one-fourth to perhaps 33 1/3 per cent.

The Court: Returns?

The Witness: Yes. But it has never been checked.

The Court: In other words, approximately 70 per cent of the names submitted, whether out of your box, the jury commissioner's list, or any other source do not answer? [190]

The Witness: Yes.

* * *

The Court: Mr. Clerk, previous to the present system of impaneling the petit jurors, each judge of the court impaneled his own panel, is that not correct?

The Witness: That is correct.

The Court: Do you know what date that system changed now to where we have what he call the pool system?

The Witness: The order of court, Government's Exhibit No. 1, dated December 23, 1941, inaugurated the present system. [191]

The Court: Inaugurated the present system and constituted the abandonment of the previous system whereby each judge had a separate venire called for him and impaneled a separate jury?

The Witness: That is correct.

The Court: Very well. That is all I had.

Mr. Margolis: Just this one matter.

(Testimony of Edmund L. Smith.)

Redirect Examination

By Mr. Margolis:

Q. Mr. Smith, you ascertained during the noon recess period that the entire panel, with the exception of those who had been temporarily excused for some reason until a later date, were ordered sent into this courtroom?

A. That is correct.

The Court: That was the entire panel then?

The Witness: Yes.

The Court: Did you find that Conference of Senior Circuit Judges?

The Witness: I believe it is in this report of the committee of the conference of September, 1942.

* * *

The Court: By the way, for the benefit [192] of counsel, my Clerk, Mr. Horn, has tabulated Exhibit T, which Mr. Smith testified was all of the cards that were used or drawn on the 1946 petit jury, is that correct?

The Witness: Yes. I assume that they are all there. They haven't been checked.

The Court: The Clerk has found that there are 293 of them, 172 of them the cards indicate that that is their first service and 121 indicated previous service from which, according to the testimony up to now, the deduction would be made that 172 were submitted by the commissioner and 121 by the clerk.

(Testimony of Edmund L. Smith.)

Mr. Margolis: Not necessarily, your Honor.

The Court: I say up to the present time under the testimony as it stands.

Mr. Margolis: I think not, your Honor.

As I understand Mr. Smith's testimony, it was that the cards included some people whose names had previously been placed in the box but who had never been called to serve and also included those who had been excused from service previously.

The Court: The point I am trying to get at, that there were 172 new names that were taken by the commissioner and from fresh current new lists.

Mr. Margolis: I wonder if I could ask Mr. Smith on that?

The Court: That was his testimony. [193]

The Witness: That might be approximately true.

The Court: That these cards didn't get into the box from the lists submitted by the commissioner until after they had served, isn't that your testimony? They got into your so-called available file from which you draw your cards?

The Witness: And I also testified this morning that when sometimes the names are left in the box and were never used or drawn they get back into the available box.

Q. (By Mr. Margolis): It is also true, isn't it Mr. Smith, that those include jurors who were excused and never served, isn't that right?

A. That is correct.

(Testimony of Edmund L. Smith.)

Q. So that among the 172 names who have not had previous service there may be some whose names appear in the 25,000 or 30,000 cards who either were excused for one reason or another or whose names had not been pulled out of the box before the box was used?

A. That is possible.

The Court: There is a total of 179 that were impaneled, and the excused of course would be the difference there. But that percentage which you have just indicated in response to the questions of counsel would be a small number of the 172?

The Witness: Yes.

The Court: Very well. And of the 293 [194] cards there are only 16 upon which any occupation is indicated?

Mr. Margolis: That is why we did not use the cards, your Honor. We used the questionnaires, which are far more complete.

The Court: I know, but the card is the thing from which the jury is drawn. They are all in evidence anyhow.

Mr. Margolis: Yes.

I just wanted to clear up one thing on the last series of questions.

Q. On these 25,000 or 30,000 cards, aren't there a considerable percentage of those cards that are cards of jurors who have not served, jurors who have been excused?

A. Yes, I would say it was considerable.

A. For example, out of the 200 who were called

(Testimony of Edmund L. Smith.)

up for February 17th, all but 49 were either temporarily or permanently excused, isn't that so?

A. Well, are you talking about—I thought you were talking about the previous ones.

Q. I wanted to ask whether that was the general pattern after I had asked this question. I will withdraw the previous question.

Isn't it a fact, Mr. Smith, that generally speaking 50 per cent or more of the jurors are excused?

A. Yes.

The Court: You got 293 finally, or approximately 300, and there is 179 impaneled, so that [195] would be a little less than 50 per cent that were excused.

Q. (By Mr. Margolis): Out of the 179 there are some who may still be excused?

A. That is correct.

Mr. Margolis: This doesn't indicate the total number of excuses, this only indicates the number who were impaneled and, as I understand it, there are some who are excused even after impanelment.

The Court: They are excused during the term.

Mr. Margolis: Yes, and they may never serve, and their names may get into this list of 25,000 or 30,000.

The Court: They may serve on a trial and get excused during the term due to a death in the family.

The Witness: But if a juror had been impaneled the card would show impaneled and the date.

The Court: Yes.

(Testimony of Edmund L. Smith.)

Q. (By Mr. Margolis): Are copies of this available?

A. That is the only copy I have.

The Court: I suppose it is some place. I haven't gotten one. I don't know where to find it.

Mr. Margolis: I wonder sometime during the course of the trial—is that going in as an exhibit, your Honor? [196]

Mr. Calverley: We will offer it, your Honor, as a Government exhibit.

The Court: We will mark it and put it in evidence.

The Clerk: No. 2 for the Government.

(The document referred to was received in evidence and marked Government's Exhibit No. 2)

* * *

The Court: Let me see the accompanying letter.

It is a mimeographed letter, dated November 18, 1942, signed by Henry P. Chandler, the Director of the Administrative Offices of the Court. I will read the letter in the record.

“At the request of Judge John C. Knox, Senior Judge of the United States District Court of the Southern District of New York at New York City, I am sending you a copy of the Report to the Judicial Conference of the Committee of which he is the Chairman on the subject of Selection of Jurors. Copies of this report were sent to members of the Conference

(Testimony of Edmund L. Smith.)

and the following action in regard to it appears in the Judicial Conference report: [197]

“ ‘Jury Selection—Last year a committee of district judges, consisting of District Judges John C. Knox, Harry E. Watkins, Walter C. Lindley, Colin Neblett and James M. Proctor, was appointed to study the methods of jury selection in the Federal Courts. The committee presented to the Conference a comprehensive report recommending important changes in the mode of selecting juries, and requested that the report be distributed to all Federal judges, clerks of court, jury commissioners, and other persons interested in the subject. Accordingly the Conference directed that the committee be continued, that the report be circulated as requested, and that suggestions or criticisms concerning it be invited for submission to the committee.’

“A summary of the recommendations of the committee is found on pages 5 to 12 of the Report. Judge Knox has asked me to say that he would welcome a statement of your views regarding the Committee’s proposals. The Committee will consider the opinions which are expressed and will hereafter make a further report to the Judicial Conference.

“Yours sincerely,

“(Signed) Henry P. Chandler

“Director” [198]

* * *

(Testimony of Edmund L. Smith.)

I will hand you this book—we will mark it first.

The Clerk: Government's Exhibit No. 3.

Mr. Calverley: That is agreeable, your Honor.
We will offer it.

The Court: Very well. [200]

(The document referred to was received in evidence and marked Government's Exhibit No. 3.)

The Court: Did you ever see copies of this book?

The Witness: I have seen them but I have never known them to be used here.

The Court: You have never known them to be used?

The Witness: Except Judge Jenney might have used them at one time, but I am not positive of that, because the only ones that I ever saw were the ones that he had in his chambers. [201]

* * *

Mr. Margolis: I would like to call Mr. Brown to the stand.

The Court: Very well.

ARVIN H. BROWN,

called as a witness by and in behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Arvin H. Brown.

(Testimony of Arvin H. Brown.)

Direct Examination

By Mr. Margolis:

Q. Mr. Brown, what position do you hold?

A. Jury commissioner for the United States District Court of this district, Southern District of California.

Q. For this court?

A. This court; yes.

The Court: In this Central Division?

The Witness: Yes. I didn't know that before.

The Court: There are jury commissioners in other divisions and this court goes to other divisions.

The Witness: In other words, Central Division of the Southern District.

Q. (By Mr. Margolis): Now, Mr. Brown I have before me the affidavit executed by you, dated February 17, 1947, and in which you state that you use as one source of obtaining names of prospective jurors, and I quote, "a list of registered owners of automobiles in the Los Angeles area." Where do you obtain that list?

A. There is a company that gets those out. I don't know the name of it, but it is here in Los Angeles, and I obtained some of the lists from a friend of mine who got them for me.

Q. What are these lists? Are these lists [203] of some of the registered owners or all of the registered owners?

(Testimony of Arvin H. Brown.)

A. I really don't know. They seem to get them out from time to time. I think it is some sort of a service.

Q. Do you know how many names there are on those lists?

A. No, I don't. This was some time ago that I got those. They are old lists and I really don't know how many names there are on them.

Q. How long ago did you get those lists?

A. I don't know; several years ago.

Q. Do you know whether there was a service which was prepared and offered to new car dealers or used car buyers?

A. I think it was for insurance companies, but that is just a guess of mine. You see, they want to go out and solicit the insurance from the car owners. But I would like to qualify that answer and say that I don't know that to be a fact.

Q. In other words, all you know is that it is a list of some registered owners of automobiles in the Los Angeles area?

A. That is right.

Q. You don't know how it was selected or to what extent it constitutes all of them?

A. No, I do not.

The Court: You don't know that it actually was a list, you were told it was a list by the person who gave it to you? [204]

The Witness: It was a printed list. I think it was definitely a list.

(Testimony of Arvin H. Brown.)

Q. (By Mr. Margolis): Now you refer to the fact that you obtained lists from rosters of various clubs.

A. Yes.

Q. Will you please enumerate the clubs from which you obtained lists?

A. I would like to, before I answer that question, say that this goes back, my tenure of office goes back almost 16 years, and those club rosters—and I am digging down in my memory now—were at the early period of my tenure of office, as I remember it.

The Court: How long since you resorted to club rosters?

The Witness: I would say I haven't used them since the very early period.

The Court: Have you used them during the past 10 years?

The Witness: Not to my memory.

The Court: Then I think it is immaterial.

The Witness: Wait a minute, now.

Mr. Margolis: I think not.

The Witness: Your Honor, may I correct that? I did get a list from the Friday Morning Club within the last four, five years or three or four years.

The Court: Except for that? [205]

The Witness: Except for that I can't remember any for the past 10 years.

The Court: Have you used them in the past 10 years?

The Witness: No.

(Testimony of Arvin H. Brown.)

Mr. Margolis: I want to suggest this, your Honor, the names of jurors, prospective jurors, selected from that list who either served or who were excused or whose names somehow got into the 25,000 or 30,000 cards that are being used again, therefore this evidence going back to 1925 is material because we are still drawing upon the same sources through the utilization of the 25,000 to 30,000 cards. I therefore would like to pursue this inquiry to find out what clubs and to what extent these lists were used.

The Court: Sixteen years ago would be 1930.

The Witness: 1931, your Honor, the latter part of this month. I think my affidavit tells the date, Mr. Margolis.

Mr. Margolis: February 26, 1931.

The Witness: Yes.

The Court: That was the year you did it?

The Witness: Either that or the next year, somewhere along in the very early part.

The Court: How many names did you put in?

The Witness: I can't remember.

The Court: Was it 50?

The Witness: I think it would be a few hundred from the combined two or three clubs. [206]

The Court: I don't think many of those would be left in that 25,000 or 30,000.

Q. (By Mr. Margolis): For how many years did you do this?

A. I only did that the starting period. I didn't keep doing it because I had run through them and that was all there was to it.

(Testimony of Arvin H. Brown.)

The Court: Just the one time?

The Witness: That is right.

Q. (By Mr. Margolis): You did it just for one year, is that right?

A. Either one or two years. As I say, it is so long ago I can't tell you for sure.

Q. Do you remember what the clubs were?

A. Yes.

Q. What were they?

A. Shall I answer?

The Court: Go ahead.

The Witness: The Los Angeles Country Club.

Q. (By Mr. Margolis): What kind of a club is that?

A. That is a country club where people play golf.

Q. Society club or golf club?

A. I should think so. [207]

Q. All right. Go ahead.

A. And the other one was the University Club of Los Angeles, which is on Hope Street. I don't know how to classify that, but you probably know.

Q. I think it is well known.

The Court: Well, you had better put it in the record.

The Witness: The other one was the California Club on Flower Street.

Q. (By Mr. Margolis): What kind of a club is that?

A. That is, would you call that a social club? I don't know.

(Testimony of Arvin H. Brown.)

Q. Would you say it is a club to which well-to-do people belong?

A. I wouldn't say that. I think there are well-to-do people in it, but whether it is——

Q. Would you say workers belong to that club?

A. No, I don't believe I can honestly say that, Mr. Margolis.

The Court: You mean manual workers?

Mr. Margolis: Manual workers, that is right. People who work in factories and truck drivers, people of that kind I am talking about.

The Witness: I don't whether my judgment is correct or not, but if there are people of that [208] kind in there I imagine they would be in a great minority.

Q. (By Mr. Margolis): You happen to know that they have a \$1250 initiation fee?

A. I don't, but they didn't in '31. I think you could get in—as a matter of fact, I think you could get in if you would take a membership, although I don't know that.

The Court: You could get in if you agreed to pay the dues?

The Witness: I suppose so.

Mr. Kenny: As a member of the club I will have to correct that.

The Court: It was offered to me on that basis. However, I am not testifying. And it was back in those days too. That was before I had any public office of any kind.

(Testimony of Arvin H. Brown.)

Q. (By Mr. Margolis): What others?

A. There are no others that I remember, Mr. Margolis.

Q. You referred to the Friday Morning Club. Is that a businessmen's club?

A. No, that is a women's club, the nature of which I am sorry to say I can't enlighten you on.

Q. And that Friday Morning Club, you used the last four or five years?

A. I have used that since women were taken in on the jury.

Q. That would be since 1943?

A. Whatever date that was, I have forgotten.

Q. Have you used that once or more than once?

A. Just once. And maybe I better not interject anything here, better leave it to your questions.

Q. Go ahead.

A. I was going to say it was a very small list. The Court: How many names on it?

The Witness: Well, I had less than a hundred.

Q. (By Mr. Margolis): May I ask you this? Was this a selected list given you by the club or was it the entire membership list of the club?

A. No, I solicited, I think I wrote to the president or the secretary, and asked for a list to be used for this purpose, and that was the response I got.

Q. That was what you did with the other clubs, too?

A. No. Way back in that early day the clubs published a little roster of their memberships, and I got hold of those. It is so long ago I can't re-

(Testimony of Arvin H. Brown.)

member how I selected them, but I didn't turn in the whole list, but took names out of them. Now on what basis, I don't know.

Q. Now you referred to the Southwest Blue Book. When did you use that? [210]

A. From the very early part too, and then within the last—let's see, I am trying to think—within the last three or four years, only for an area. I wanted to get some Pasadena names and I used it then. That is as I remember it.

Q. Do you know how many names you obtained from the Southwest Blue Book?

A. No, I don't.

The Court: Have you used it except for the Pasadena names within the last 10 years?

The Witness: No, I am quite sure I haven't. However, I would like to qualify that.

The Court: How many names out of that did you put in altogether?

The Witness: In both times?

The Court: No, exclusive of the Pasadena names.

The Witness: You mean way back in the early days?

The Court: Yes.

The Witness: I don't know.

The Court: Well, several hundred or several thousand?

The Witness: No, I should think there wouldn't be several thousand; I should think there would be—well, I am going to guess—along around 1500, say.

(Testimony of Arvin H. Brown.)

The Court: It wouldn't be 25,000 or 30,000?

The Witness: Oh, no. [211]

Q. (By Mr. Margolis): How many names are there in the Blue Book?

A. I don't know.

Q. What is the Southwest Blue Book?

A. I think I would call that a social register.

Q. Now you say that you have used lists furnished by labor unions.

A. That is right.

Q. What labor unions?

A. There were some of the railroad brotherhoods.

Q. When were those used?

A. Well, I can't answer because I don't remember.

Q. A long time ago?

A. Not so very long ago. I would say within the last six years.

Q. Any other unions besides the railroad brotherhoods?

A. None that I got specifically. You see these were gotten specifically but when you question me further you will probably elicit from me further sources where labor unions might naturally be included, members of labor unions, but not the unions themselves.

Q. For example, there might be members of labor unions in the telephone directory.

A. That is right.

(Testimony of Arvin H. Brown.)

Q. That is what I am not referring to. The only specific labor union lists that you have used have been lists from the railroad brotherhoods, is that right?

A. I believe that it right.

* * *

Los Angeles, California; February 19, 1947

2:00 o'Clock p.m.

* * *

Direct Examination

(Continued)

The Witness: May I give you these lists now? They are in chronological order.

The Court: Let us have the clerk mark them.

Did you want to say something?

The Witness: I would like at the present time to make some corrections in my testimony of this morning.

The Court: That is all right. We will mark these next in order.

The Clerk: For the Government? [215]

The Court: Call them 4-A, -B, -C and -D.

The Clerk: 4-A is list of 89 names delivered to clerk 2/2/43.

(The document referred to was received in evidence and marked Government's Exhibit No. 4-A.)

(Testimony of Arvin H. Brown.)

The Clerk: List of 58 names delivered to clerk 3/16/44 will be 4-B.

(The document referred to was received in evidence and marked Government's Exhibit No. 4-B.)

The Clerk: List of 452 names delivered to clerk 3/16/44 will be 4-C.

(The document referred to was received in evidence and marked Government's Exhibit No. 4-C.)

The Clerk: List of 302 names delivered to clerk on 3/16/44 will be 4-D.

(The document referred to was received in evidence and marked Government's Exhibit No. 4-D).

The Clerk: List of 27 names delivered to clerk 3/27/44 will be 4-E.

(The document referred to was received in evidence and marked Government's Exhibit No. 4-E.)

The Clerk: List of 69 names delivered to clerk 5/17/45 will be 4-F.

(The document referred to was received in evidence and marked Government's Exhibit No. 4-F.) [216]

The Clerk: List of 1,000 names delivered to clerk 5/17/45 will be 4-G.

(Testimony of Arvin H. Brown.)

(The document referred to was received in evidence and marked Government's Exhibit No. 4-G.)

The Clerk: List of 505 names delivered to the clerk 5/17/45 will be 4-H.

(The document referred to was received in evidence and marked Government's Exhibit No. 4-H.)

The Clerk: List of 1175 names delivered to the clerk 5/17/45 will be 4-I.

(The document referred to was received in evidence and marked Government's Exhibit No. 4-I.)

The Clerk: 4-J will be a list of 500 names delivered to the clerk 12/7/45.

(The document referred to was received in evidence and marked Government's Exhibit No. 4-J.)

The Clerk: 4-K will be a list of 1,055 names delivered to the clerk 8/22/46.

(The document referred to was received in evidence and marked Government's Exhibit No. 4-K.) [217]

* * *

Q. Perhaps I can put it this way, Mr. Brown: Exhibit P, which is in evidence, it is indicated it was put in the box on May 1, 1944. The date of delivery

(Testimony of Arvin H. Brown.)

to clerk is not shown. The first name on the list is Dorsett, and it appears to be a list of men in its entirety. You have a copy of that? Is that duplicated with those that you brought in?

A. I don't seem to have it.

The Court: That is not a duplicate, then.

Mr. Margolis: It appears not to be, your Honor.

I have arranged them in chronological order, your Honor. There is one here which indicates some names were put in the box on 7/30/45, a list which appears to be entirely of women, the first name being Mary Abascal.

Q. Is that a duplicate?

A. Yes, I have that.

Mr. Margolis: That is a duplicate, if your Honor please, of Exhibit marked 4-I. In other words, Exhibit R and 4-I appear to be duplicate copies of the same list.

The Court: Just take those that duplicates and the clerk will clip them together so we won't get them mixed up. Those two are duplicates, you say?

Mr. Margolis: Yes, they appear to be.

The Court: Let's leave these in here by this witness' exhibit numbers and use these because they are in chronological order and they will be easier to follow than the letters, so let us use them.

Mr. Margolis: We can withdraw R. I would be willing to withdraw it, your Honor.

The Court: All right. We can withdraw R.

Mr. Margolis: On the grounds that it is duplicated by 4-I.

The Court: Very well.

(Testimony of Arvin H. Brown.)

The Clerk: All the exhibits, 4-A to 4-K, are admitted in evidence, your Honor?

The Court: Yes, they are all in evidence.

The Clerk: And Exhibit R is withdrawn?

The Court: Exhibit R is a duplicate of 4-I.

Mr. Margolis: Exhibit Q, list put in the box, some of them, 3/30/45, the first name being Herbert V. Acker, seems to be a list entirely of men. That appears to be duplicated by Exhibit 4-H.

At this time I move leave to withdraw Exhibit Q on the grounds that Exhibit 4-H is a duplicate.

The Court: So ordered.

Mr. Margolis: With regard to Exhibit M, questionnaires mailed 11/8/45, the first name is Mrs. Mabel McMillan. You have handed me a duplicate, Exhibit 4-F. I move to withdraw Exhibit M on the grounds that 4-F is a duplicate.

The Court: So ordered.

Mr. Margolis: The next one, Exhibit S, questionnaires mailed 11/6/45, the first name is T. V. Cadick, appears to be a list entirely of men. Do you have a duplicate for that?

I have been handed what appears to be a duplicate, which is Exhibit 4-G. I ask leave to withdraw Exhibit S on the grounds that Exhibit 4-G is a duplicate.

The Court: So ordered.

Will you indicate that in the minutes, Mr. Clerk?

The Clerk: Yes, I am doing that, your Honor.

Mr. Margolis: Exhibit N, received 12/16/45, first name is Annabell Whittaker, and you have

(Testimony of Arvin H. Brown.)

handed me a duplicate, 4-J. I make the same motion with regard to Exhibit N on the same grounds.

The Court: So ordered.

Mr. Margolis: Now, with regard to Exhibit O, the first name is Albert Guinn, and you have handed me a duplicate, 4-K. Same motion with regard to Exhibit O and for the same reasons, your Honor.

The Court: So ordered. [221]

Mr. Margolis: The only one that appears not to be a duplicate, and perhaps we had better check that again, the first name is Dorsey.

The Witness: No, I don't seem to have it.

Mr. Margolis: Your Honor please, on examination it appears to indicate that all of the lists previously introduced through Mr. Smith, with the exception of Exhibit P, which is still in evidence, were duplicates of those which have been presented at this time by Mr. Brown marked Exhibit 4-A to 4-K, inclusive.

The Court: What is the date of that list?

Mr. Margolis: The only date that is show, your Honor, is put in box May 1, 1944. There is no indication of when questionnaires were mailed or when the list was delivered to the clerk.

The Court: Very well.

Now, Mr. Brown, are those all of the lists that you have submitted to the clerk since—what is the first date there, 1944?

The Witness: This seems to be 2/2/43.

The Court: Since February, 1943?

The Witness: So far as I could determine, your Honor, that is a fact.

(Testimony of Arvin H. Brown.)

The Court: All of the lists you have submitted and put in the box? [222]

The Witness: Yes.

The Court: Now, you said you wanted to correct your testimony, Mr. Brown.

The Witness: Yes, if I may.

The Court: Very well.

The Witness: This morning you asked me if there were any other clubs during the last 10 years that I had gotten lists from, and I mentioned the Friday Morning Club. I neglected to also say that I got a few names from the Ebell Club.

Q. (By Mr. Margolis): What kind of an organization is that?

A. That is a women's club. I think it is somewhat like the Friday Morning Club.

Q. You did that within the past few years?

A. Yes. I think the list is there and it has the date on it.

Q. Is it one of the lists which you have just presented?

A. Here it is; 3/16/44.

Q. It is list 4-B, with 58 names on it?

A. Yes.

Q. As I understand it, you asked the Ebell Club for a list of names, and this is the list that was furnished you by the Ebell Club?

A. That is correct. [223]

May I further correct my testimony? This morning we were talking about the Blue Book.

The Court: The Southwest Blue Book?

(Testimony of Arvin H. Brown.)

The Witness: The Southwest Blue Book, and I was asked if I had gotten any names from that source during the last 10 years, and I said that I had gotten some for the Pasadena area.

Mr. Margolis: That is correct. That is what you testified to.

The Witness: And when I went to get these papers that I was asked to bring in, I discovered that I had also gotten some from the Los Angeles area.

The Court: At the same time?

The Witness: I think it was.

Q. (By Mr. Margolis): Do you have that list there?

A. It is in the clerk's hands there, I think. I could identify it, I think.

Q. Perhaps we might do this, if you would start with Exhibit 4-A and tell us with regard to each list where you obtained the names, that might be a more orderly way of doing it.

A. 4-A is a list of 489 names.

The Court: And as you call the exhibit, will you give the date, please?

The Witness: February 2, 1943. There is no indication [224] where I got this list from.

Q. (By Mr. Margolis): Do you have any recollection of it?

A. But I would like to say that the best of my belief is that it is a list that I obtained just going through a telephone book.

(Testimony of Arvin H. Brown.)

Q. By the way, when you go through the telephone directory, what system, if any, do you follow?

A. I can say that I haven't any system whatsoever. I don't know of any systematized mathematical way of going through the book. I just open a page and turn a few pages and pick out names at random. I don't know who the people are. I imagine one out of many thousands I might know.

Q. Do you pay any attention to addresses?

A. No, because in many cases I don't know where the streets are.

Q. Do you pay any attention to addresses where you know where the streets are?

A. What do you mean?

Q. Are you guided in any way in your selection by that? A. Oh, no; no I wouldn't.

Q. Did you have any system of selecting a certain number from a page and then turning to another page?

A. No, I haven't any system at all. Of course, by "addresses," do you mean, for instance, sometimes I will concentrate [225] a little bit in Glendale or Beverly Hills or Pasadena or Long Beach or San Pedro, Santa Monica, but you meant street addresses, didn't you, in your question?

Q. Yes. A. No, I don't.

Q. Have you paid any attention to the names from the standpoint of nationality which might be indicated by the names? A. No.

(Testimony of Arvin H. Brown.)

Q. Do you know whether there are any names in those lists which indicate that the persons are of Spanish or Mexican origin?

A. I would think they were, but I couldn't put my finger on any of them.

Q. That is how 4-A was obtained? A. Yes.

Q. I think you have already answered the questions with regard to 4-B. Isn't that the Ebell Club list? A. Yes.

The Court: By the way, 4-A has the names of men and women.

Mr. Margolis: 4-A has the names of women only, I believe.

Q. Your list generally consists either of men or women?

A. Yes. I haven't mixed them, as I remember.

The Court: 4-A is women only?

Mr. Margolis: It appears to be, your Honor. 4-B is the Ebell list.

Q. What is 4-C?

A. Would you like the date of 4-B?

Q. Excuse me. A. It is March 16, 1944.

The Court: That 4-A was how many names?

Mr. Margolis: 4-A, your Honor, was 489.

The Court: All females?

Mr. Margolis: That is correct. And 4-B is 58 names, all females.

The Court: And the date?

Mr. Margolis: 3/16/44 delivered to clerk.

The Court: That is 4-A?

Mr. Margolis: 4-A is February 2, 1943.

(Testimony of Arvin H. Brown.)

The Court: And 4-B is what?

Mr. Margolis: 58 females, March 16, 1944.

The Court: 4-B was the Ebell Club, and 4-A is the telephone book?

Mr. Margolis: That is correct.

The Court: All right. Now, 4-C.

The Witness: 4-C is a list of 452 names of men, dated March 16, 1944, with no indication as to where they were obtained. [227]

The Court: Do you have any recollection?

The Witness: I think that I got them from the telephone book, as I got the other one.

Q. (By Mr. Margolis): That is your best recollection? A. Yes.

Q. Do you have any means of refreshing your recollection on the subject?

A. No, I haven't, I am sorry.

The Court: By the way, I think the record ought to show that the compensation that Mr. Brown gets, while it is in the statute—what is your compensation, Mr. Brown?

The Witness: Well, I get a fee every time the clerk and I meet. I imagine I average \$15 a year.

The Court: The statute limits you to \$5 a quarter, doesn't it?

The Witness: I don't know.

Mr. Smith: Not more than \$15 a quarter.

The Court: What fee do you get when you meet with the clerk?

The Witness: \$5.

The Court: Your compensation averages \$15 a year?

(Testimony of Arvin H. Brown.)

The Witness: \$15 a year.

The Court: You were allowed no stenographic help?

The Witness: No.

The Court: The government furnishes you with no office? [228]

The Witness: No.

The Court: No telephone?

The Witness: No.

The Court: No facilities of any kind or nature?

The Witness: No facilities.

The Court: Do they give you a pencil, or do you take one from the clerk's office once in awhile?

The Witness: No. I don't know whether it would be an appropriate time for me to volunteer or not, but in the beginning when I wanted to get some lists or purchase some, you know, some mailing lists from these people, various people, just on one or two occasions, with my own money, and the \$15 a year that I got I used, when I would get it, give it to the stenographer that used to type these up for me, but she is gone now and I haven't any-one.

The Court: You have to pay to have these typed up out of your own pocket?

The Witness: I haven't had any assistance since she left. She just left recently.

Mr. Margolis: It seems to me, your Honor, that this is one group that is worse off than the fishermen.

(Testimony of Arvin H. Brown.)

The Court: I think it is all material because the lower courts are charged with the duty of administering justice and we have to do it according to the cloth that is cut for us by the law, including the Appropriations Committee. [229]

Q. (By Mr. Margolis): Do you have some other employment, Mr. Brown?

A. I am glad you asked the question. In answering your question, I have to take care of this work of getting lists at odd times because I am not retired, I work for a living.

Q. What is your other employment?

A. I am in the business management field. I am a real estate broker, but I don't do very much real estate business. I am managing the business affairs of a client.

Now, I have to find time, odd times, for this work, so that is the reason sometimes my files aren't marked the way they should be.

The Court: I thought this ought to go into the record some place, so you may proceed with the interrogation on the lists, unless you have further questions.

Mr. Margolis: No, your Honor. I would like to go on with 4-D.

The Witness: 4-D is a list of 302 women dated March 16, 1944, without any indication as to the source, but on all those that are not indicated, I really believe they came from the telephone directory.

(Testimony of Arvin H. Brown.)

Q. (By Mr. Margolis): That is your best recollection? A. That is my best recollection.

Q. How about 4-E? [230]

A. 4-E is a list of 27 women from the Friday Morning Club, dated March 27, 1944.

Q. And that list, at your request, was furnished you by that club? A. It was; yes.

Q. And then you have 4-F?

A. 4-F is a list of 69 women from the Congress of Parents and Teachers, dated May 17, 1945.

Q. Can you tell us how you got that list?

A. I wrote for it.

Q. Who did you write to?

A. I couldn't tell you. I haven't got the letter. But I think it was—I think they call it the Tenth District, I am not sure, but I could find out, if that is an important point.

Q. That may not be necessary.

Is this the same organization as the Parent-Teacher Association?

A. Well, I kind of think it is. I think they call it the Congress—maybe that is the official name.

The Court: Known as the P.T.A.?

The Witness: Well, this is called the Congress of Parent Teachers.

The Court: You don't know whether it is the same thing as is commonly known as the P.T.A.?

The Witness: I rather think it is, but I am not so sure.

Q. (By Mr. Margolis): When you wrote and asked this Congress of Parents and Teachers to

(Testimony of Arvin H. Brown.)

furnish you with a list of names, I assume you asked for all women because the list seems to be all women?

A. I imagine I did, but I don't remember.

Q. Do you remember whether you laid any other qualifications down? A. No, I don't.

Q. You don't remember whether you did or not?

A. No, I don't.

Q. How about 4-G?

A. Wait a minute. I think I told them that I would like it exclusive of the teachers. I think I can say that. That is as I remember it. I am not quite sure, but I think I put that in. I wanted to be sure about these things. 4-G is a list of 1,000 names of men marked auto lists and telephone book, delivered May 7, 1945.

Q. What were the sources of that list?

A. The telephone directory and the list of automobile owners that I spoke to you about this morning.

Q. Do you know how many of the names on the list came from the telephone book and how many from the automobile list? [232]

A. No, I don't. I have no way of knowing that.

Q. Has your memory at all been refreshed since this morning about the type of lists, the auto lists that you used?

A. Just as I said, it is a service of some kind. I borrowed a list or two. It is a printed list. They get them out, and I think they are used for insurance agencies to go around and try to get insurance.

(Testimony of Arvin H. Brown.)

Q. Probably a list of new automobiles?

A. The list I used was an old list. Someone had used it and I borrowed it.

Q. Do you know what year the list was for?

A. No, I don't. I am sorry.

Q. You don't have the list any more?

A. I don't believe I can find it.

Q. Now, 4-H, Mr. Brown.

A. 4-H is a list of 505 names of men from the Southwest Blue Book. Your Honor, I haven't got the Southwest written on here.

The Court: Is there any other blue book?

The Witness: Not that I know of.

Mr. Margolis: There are several blue books, your Honor.

The Witness: Shall I write "Southwest" in there?

The Court: No.

The Witness: This was delivered on May 17, 1945. [233]

The Court: That is the sort of social register that you were talking about?

The Witness: Yes.

* * *

The Witness: I just want to emphasize that these names were taken from the Blue Book and did not include the entire list of the Blue Book.

The Court: This was mostly Pasadena.

The Witness: Wait a minute. No, this was—which one have you got there?—yes, in the Pasadena area, San Marino, Flintridge, and all those communities. [234]

(Testimony of Arvin H. Brown.)

The Court: Why did you choose some from Pasadena?

The Witness: I thought perhaps we should put into the list people from that area.

The Court: From that area?

The Witness: Yes.

The Court: You mean that the lists were deficient in that respect?

The Witness: No. This was a list of women, wasn't it?

The Court: You said 505 men.

The Witness: I did?

Mr. Margolis: Yes, it is 505 men.

The Court: Why did you pick the Blue Book?

The Witness: Just as a source. I couldn't give you any reason. I had to pick some source, and that seemed to be a good one.

The Court: You mean a source of persons who, if listed, would likely be not incompetent to act as jurors?

The Witness: I did not have that in mind, sir.

Q. (By Mr. Margolis): I think we are down to 4-I now.

A. 4-I is a list of 1175 women from the Southwest Blue Book, delivered May 17, 1945, and that is from Los Angeles, isn't it?

Mr. Margolis: There seems to be a lot of Beverly Hills addresses on here. Here is the way it goes: Los Angeles, West Los Angeles, Los Angeles, Bel Air, Beverly Hills, Los [235] Angeles, Beverly Hills, and so forth.

(Testimony of Arvin H. Brown.)

The Witness: Well, it is all around, then.

Mr. Margolis: Yes, it seems to cover quite a territory. I would say about one-third was Beverly Hills, just looking at it quickly.

Q. How about 4-J?

A. 4-J is a list of 500 women delivered to the clerk on December 7, 1945, and I have marked it "Various," which indicates to me that it was from the telephone directory. That is the way I sometimes marked it.

Q. It wouldn't mean various sources?

A. No.

Q. Selected at random in the way you have indicated?

A. Yes, that is right.

Q. 4-K?

A. 4-K is a list of 1055 men delivered August 23, 1946, without indication of the source, but I would like to testify as I did previously about similar lists that had no indication on them.

Q. In other words, from the telephone book?

A. That is the best of my belief.

Q. Now, Exhibit P, of which you appear not to have a copy——

The Court: What date is that?

Mr. Margolis: The only date we have on Exhibit P is that [236] it was put in the box May 1, 1944. We have no indication of when the list was delivered to the clerk or whether, in fact, it was delivered to the clerk.

The Court: The clerk produced that?

(Testimony of Arvin H. Brown.)

Mr. Margolis: Yes, the clerk produced that, but there is no indication on here as to where it came from.

The Witness: I can't identify that list.

Mr. Margolis: You can't identify this list?

The Witness: Yes.

The Court: How many names are on it? The clerk testified that Mr. Brown gave him that list.

Mr. Margolis: There are a lot of names on here.

The Court: Isn't there a number on it?

Mr. Margolis: No, your Honor. There appear to be 30 pages, or, rather, 30 names per page, and there are 36 pages, which would indicate about 1080, if my multiplication is correct.

The Court: Men or women, or men and women?

Mr. Margolis: They appear to be all men, your Honor, without checking each name, just a spot check.

The Court: You don't recognize the list at all?

The Witness: Your Honor, I really think it is my list, but there is nothing on it to indicate where I got it, whether it is from the telephone book or whatnot. I think it is the telephone book. [237]

The Court: Very well.

Q. (By Mr. Margolis): None of those lists that you turned over are lists that you obtained from any union, is that right? A. No.

Q. Were the union lists used prior to 1943?

A. Yes.

Q. Do you remember when?

A. I don't; no.

(Testimony of Arvin H. Brown.)

Q. Do you have those lists?

A. I haven't them; no. They were just a few names, though, as I remember.

Q. Now, in your affidavit you refer to the use of assessment lists. Where did you obtain those lists?

A. Well, that was a list that I used in the very early days of my work here, and my recollection is that someone had a list and allowed me to use it, a list of personal property people who had paid assessments on personal property. It is so far back that I don't recall the nature of the list, or much about it, or how many names were on it.

Q. Or how many names you obtained from that?

A. That is right.

Q. In your affidavit you refer to lists from the Parent-Teachers Association. Was that with reference to the list from the Congress of Parents and Teachers? [238]

A. That is right.

Q. That is what you intended by it?

A. Yes.

Q. Were there any lists from the Parents-Teachers Association?

A. Not that I got lists from.

Q. You also referred in your affidavit to a list of colored people obtained from a colored minister residing in Los Angeles.

A. That is right.

Q. Who was this colored minister?

A. He was a man named Collins, C-o-l-l-i-n-s.

Q. Where was his church located?

A. His church was on the corner of East Eighth Street and Towne Avenue, as I remember it.

(Testimony of Arvin H. Brown.)

Q. You just happened to meet him and asked him for a list, is that right?

A. I went to a wedding there and so it occurred to me, I wanted to get some names, so I looked him up, I thought he was a very nice sort of a person and thought perhaps he could furnish me with a list. I didn't know where to get those kind of names. As I have testified before, I am sort of hampered, so I thought that that would be a good source, and I went to see him and he did get me a list. It wasn't a large list, but I put it in the box, or, rather, I gave it to the clerk. [239] It must have been four, five, six years ago.

Q. Just the one list you obtained from him, is that right?

A. That is correct.

Q. Did you tell him what kind of people you wanted on the list?

A. No, no.

Q. Just that you wanted some colored people?

A. I just wanted a list of people. I told him the purpose that I wanted it for.

The Court: To serve on a jury?

The Witness: That is right. But I didn't indicate to him to get—well, I wouldn't know how to classify them, would I?

Q. (By Mr. Margolis): You just said you wanted colored people to serve on the jury?

A. That is correct.

Q. Did you ever obtain a list, say, from a Catholic priest in the area in which a large number of Mexican-Americans resided?

A. I never have; no.

(Testimony of Arvin H. Brown.)

The Court: Do you know of any organization which is composed exclusively of Mexicans?

The Witness: Were you addressing me, sir?

The Court: Yes. [240]

The Witness: No, I don't.

The Court: Did you know where to go to get a list of Mexicans who were citizens and otherwise likely to be qualified?

The Witness: No, I wouldn't.

The Court: Would you know where to go to get a list of Negroes?

The Witness: No, I wouldn't.

The Court: Would you know where to go to get a list of any of the other nationalities or races, Japanese or Negroes or Chinese who were born in the United States?

The Witness: Well, Japanese, I just got a list a few months ago from a minister.

The Court: Did you give that to the clerk?

The Witness: No. I don't know why I didn't bring that in.

The Court: You have another list of Japanese?

The Witness: I don't know whether it was during this period or not, but I didn't run into it in my files. You know, my files aren't what they should be. But I did get a list.

The Court: Do you have that list, Mr. Smith?

Mr. Smith: I think so.

The Court: Will you get it? [241]

(Testimony of Arvin H. Brown.)

Q. (By Mr. Kenny): I am going to ask you, Mr. Brown, on 4-A, 4-B, 4-D and 4-E, how many addresses you find there that are south of Pico and east of Hoover Streets? I think the Court would take judicial notice that that would exclude the Wilshire, Beverly Hills and Hollywood areas.

The Court: South of Pico and east of Hoover? That includes the Wilshire district.

Mr. Kenny: No, I am excluding them.

The Court: It is exclusive of the Wilshire area, then?

Mr. Kenny: I would say so. Once you get south of Pico you are out of the Wilshire area.

The Court: How about West Adams?

Mr. Kenny: I am being very generous for the purpose of this question.

The Court: On West Adams there are very fine homes, and there are a large number of colored people living there, also south of Normandie and also in Sawtelle and now in Hollywood.

Mr. Kenny: My question was, how many—I don't think there are any from a cursory inspection—but if there are any in those lists, 4-A, 4-B, 4-D or 4-E, that are residents [242] south of Pico or east of Hoover.

The Court: Do you want him to take the time to go through all those lists right now?

Mr. Kenny: I want to know if he could point out one.

The Court: The lists are there. I think that is more a matter of argument, don't you, Mr. Kenny.

(Testimony of Arvin H. Brown.)

Let me ask him this question: In gathering the lists from the telephone directory or any directory, did you exclude anybody by virtue of the fact that they lived south of Pico and east of Hoover?

The Witness: No, because I think you will find—I don't know whether you will find them on these lists or not—but I think you will find them on other lists. I didn't intentionally do it.

The Court: You didn't intentionally exclude them?

The Witness: No.

The Court: If you did, it was by chance?

The Witness: That was the only way I could account for it.

The Court: Did you intentionally exclude anybody from any area?

The Witness: No. [243]

* * *

Mr. Kenny: The witness testified that there were names of Spanish or Mexican origin on 4-A, 4-B, 4-C, 4-D, 4-E, 4-F or 4-G.

Q. Can you point out to me one name of a Spanish or Mexican or Italian origin?

Mr. Calverley: That is objected to, your Honor, as argumentative. The lists speak for themselves. That is arguing with the witness. I object to it on that ground.

The Court: I don't know, counsel, whether that is argument or not. There are some Spanish names, or some names that I, or any person, can recognize as of Spanish origin. There are many others that I can't. Also many people change their names.

(Testimony of Arvin H. Brown.)

Mr. Kenny: That is right. But my examination of that list, I find plenty of Spanish names, but they are street names. There are plenty of San Pasquel Streets, but I could [244] not find, and I asked the witness if he could explain or point out, a single Spanish or Mexican or Italian name in any of those lists.

The Court: I think the lists speak for themselves. I think it should be followed by this question: Did you, in selecting the names from the telephone directory, give any consideration to the kind or type of name it was?

The Witness: I didn't consciously. I might have, but not consciously. I didn't systematically go about to exclude anybody.

The Court: That is, as to the type of name, somebody whose name was Cohen or Smith or Marino or Allegretti—I suppose those are Italian names, I don't know.

Mr. Kenny: Allegretti would be one.

The Witness: But, your Honor, take the list of women, for instance, you couldn't tell from their names what origin they were because of marriage. They might be a Spanish senorita that was married, and if I went about trying to exclude her I would be defeated right at the start, wouldn't I?

Q. (By Mr. Kenny): Is it possible, Mr. Brown, that you selected those names, that it, in 4-A, that were selected from the telephone book which, as I say my observation shows that they are all in this geographical area I have described, that you sel-

(Testimony of Arvin H. Brown.)

ected them by the prefixes, such as Hollywood or Gladstone or Granite prefixes of the telephone number? [245] A. No. [246]

* * *

Mr. Margolis: * * * We have here now the Southwest Blue Book.

The Court: Is it published annually?

Mr. Kenny: Yes.

The Court: What year is that for?

Mr. Margolis: 1947.

* * *

Mr. Margolis: We will offer that in evidence, your Honor please.

The Clerk: U in evidence.

(The volume was received in evidence and marked Defendants' Exhibit U.)

Q. (By Mr. Margolis): I might ask the witness whether this is the publication which he had reference to when he referred to the Southwest Blue Book? [249] A. (Examining book.)

The Court: This is for 1947.

Mr. Margolis: Yes, but I mean for other years.

The Witness: Yes, that is right, but it wasn't 1947.

The Court: It was the previous year?

The Witness: It must have been a previous year.

The Court: But it was a book published by the same people?

The Witness: By the same people.

(Testimony of Arvin H. Brown.)

Q. (By Mr. Margolis): And having the same title except that the year is different?

A. That is right.

* * *

The Court: Proem—I suppose that means preface, I don't know.

“With an unbroken record of 43 annual editions as its background, the Southwest Blue Book for 1947 adds still another to the long series. We believe the 1947 issue will sustain this publication's reputation as the standard society register of Southern California, the book having been carefully revised and brought down to date. The listing [250] of many eligible newcomers has augmented the already large roster of older first families; there are special sections devoted to the year's marriages, clubs and other features while an unusually large number of address and telephone changes will be noted. The editor wishes to thank her many patrons for ready cooperation which has greatly lengthened the work of compiling.

“Sincerely,

“LENORA KING BERRY,

“Editor and Publisher.”

* * *

The Court: Very well. First, I would like to ask this witness this question: Except for 4-H and 4-I, which are the two lists you have indicated you took from the Southwest Blue Book, how many

(Testimony of Arvin H. Brown.)

times since you have been Jury Commissioner in the last 16 years have you submitted names from that book?

The Witness: Just once before, in the very beginning.

The Court: About how many names? [251]

The Witness: Well, I couldn't remember, but it was just a few hundred, I think. I believe I was asked this morning, but I am not sure about that.

The Court: Let me ask you another question: Since you have been Jury Commissioner, can you give an estimate of the total number of names that you have submitted?

The Witness: I haven't any accurate statistics. I don't know what is proper in a proceeding of this kind, how accurate I should be.

The Court: Well, your best recollection, if you can give me one.

The Witness: I think it would be, that I would say between 20,000 and 24,000 names.

The Court: 20,000 to 24,000 names?

The Witness: Somewhere along there, to the best of my estimation.

The Court: Well, in these years that you have given us, 1944, 1945 and 1946—that is three years—you have submitted 6500 names? That is about 2,000 names a year. Is that about the number that you submitted during the last 16 years?

The Witness: Well, that would bring it to 32,000, and it could be that many, but I don't like to testify to that.

(Testimony of Arvin H. Brown.)

The Court: Are these typical years, approximately? It doesn't have to be accurate. Are they approximately typical in number of names submitted? [252]

The Witness: Well, I would rather say the average was 1500.

The Court: 1500 a year for the past 16 years?

The Witness: Yes. That would be 24,000, wouldn't it?

The Court: Yes, about that. About 24,000 total, then, you have submitted.

Of those names, do you have any idea how many of those have gone into what you heard the clerk describe as his available box?

The Witness: I wouldn't have any way of knowing that, your Honor.

The Court: Very well. Now, the course that you have followed, with the exceptions you have indicated, as your method of selecting names during that period, has that been typical of these three years?

The Witness: I don't believe I understand the question, the course that I followed?

The Court: In getting names. You said that you had gotten some from a colored church, that you had gotten some from a Japanese church, that you had gotten these two lists on May 17, 1945, from the Southwest Blue Book, that you did it once before, you took the California Club one year and the Los Angeles Country Club, otherwise have you followed the course that you generally described in getting the 24,000 names?

(Testimony of Arvin H. Brown.)

The Witness: Yes, I think I could say that.

The Court: Proceed.

Q. (By Mr. Garrett): Your name is Arvin Harrington Brown, Jr., isn't it?

A. No. That is my son.

Q. Is he related to you?

A. He is my son; yes.

Q. And you are Mr. Arvin Harrington Brown, Sr., is that correct? A. That is correct.

Q. You are residing at 2071 South Hobart Boulevard, is that correct? A. That is correct.

Q. I am reading from the Southwest Blue Book.

A. Yes.

Q. Are you a subscriber to this publication?

A. My wife is, yes. [254]

* * *

Q. Mr. Brown, are you a member of the California Club? A. No, sir.

Q. You mentioned using one of their lists.

A. Yes.

Q. That was prior?

A. That was way back in the very beginning. That must have been back about 1931 or '32—pardon me, I was a member at that time. That is how I got the roster.

Q. How did you get the list, if you recall, from the Railroad Brotherhoods to which you have referred?

A. By correspondence. I wrote to them.

Q. Did you write to someone you knew?

A. No.

(Testimony of Arvin H. Brown.)

Q. Do you remember which one of the Railroad Brotherhoods you wrote to?

A. No, I don't, but there were several of them.

The Court: That is, you wrote to several?

The Witness: I wrote to several.

Q. (By Mr. Garrett): Were they located here?

A. In Los Angeles.

Q. About how long ago was that?

A. I think it was about five or six years ago.

Q. You don't recall which one of the Brotherhoods it [258] was which furnished you the list?

A. There were several. They sent a very few names, and I didn't—this is from memory and I can't be sure about it—but I believe that one or two didn't respond at all.

Q. Do you recall what you did with those names that were so supplied?

A. I gave them to the clerk.

The Court: That was when? You testified this morning, but I have forgotten.

The Witness: I think five or six years ago, to the best of my recollection.

Q. (By Mr. Garrett): Do you recall seeing any of those names there after you gave them to the clerk?

A. I wouldn't recognize them if I saw them.

Q. You spoke of the Los Angeles Country Club list which was used. Are you a member of that Club? A. No.

Q. Or have you been?

(Testimony of Arvin H. Brown.)

A. Well, yes, I was once, but it was long prior to this, long prior to my coming in as Jury Commissioner.

Q. And you obtained that list as a former member, I take it, of the club?

A. I don't know whether I borrowed it from some member or not. I think that is the way I got it. I don't think they would give a former member a list. [259]

Q. You mentioned a list from the University Club. Are you a member of that club?

A. No.

Q. When that list was obtained, did you obtain it as a member or a former member at that time?

A. I must have borrowed it.

Q. From some friend who was a member?

A. Yes.

Q. When you obtained this list of names from the Friday Morning Club, did you get that from a member or from a friend who was a member?

A. I wrote to someone, whom I didn't even know, one of the officers—I think it was the president, I am not sure, or the secretary.

Q. Is your wife a member of that club?

A. No.

Q. Or any of the members of your family?

A. No.

Q. Now, with respect to the other women's club, the Ebell Club, did you write for that list?

A. Yes.

(Testimony of Arvin H. Brown.)

Q. Are you acquainted with the addressee of your letter, or did you just write generally to the club? A. I just wrote to the club.

Q. Are any of the women folks in your family members of [260] that club? A. No. [261]

* * *

Q. (By Mr. Garrett): This is what I want to ask you, Mr. Brown: In going through a phone book or any list, certain names catch our attention because they are names that are familiar to us, names of persons we know, or apparently the names of families which we know. Have you, to some extent, do you think, been guided by that sense of recognition in making your check of, say, phone books and selecting names? Have you looked for names that were familiar to you?

A. No, not consciously because I wouldn't know that many names. You see what I mean, I have turned in thousands of names and I wouldn't know.

* * *

Q. (By Mr. Garrett): Now, you spoke about a list or lists which do not appear here. Have you submitted any other lists beyond these in evidence that you can recall in this year 1947?

A. No.

The Court: Before recess there was another list that you said you had submitted and Mr. Smith said he had it.

Mr. Calverley: I have it. [272]

The Court: Show it to the witness.

(Testimony of Arvin H. Brown.)

Voir Dire Examination

By Mr. Calverley:

Q. Mr. Brown, I will show you a list of 24 names with the notation at the bottom, "Mailed questionnaires 12/24/46." Do you recognize that?

A. Yes, I recognize that list.

Q. What is it?

A. That is a list of Japanese that I obtained, as testified to previously.

Q. Did you prepare this list?

A. Yes, I prepared that list.

Q. What did you do with it?

A. I gave it to the clerk.

Q. When did you give it to the clerk, as best you recall?

A. I thought it was within the last six or eight months, but I can't tell for sure.

Mr. Calverley: We will offer this list, your Honor, as government's exhibit next in order.

The Court: We will give it the number 4-L.

Mr. Garrett: Is that offered in evidence?

Mr. Calverley: It is.

Mr. Garrett: I will object to it on the ground that it does not appear relevant, in view of the fact that it has not [273] been used, nor have apparently the questionnaires been sent on it. There is no way that we can tell if it has been used.

The Court: It is admitted. He testified he submitted it to the clerk. It is admitted in evidence.

(The document referred to was received in evidence and marked Government's Exhibit No. 4-L.)

(Testimony of Arvin H. Brown.)

The Court: How many names on it?

The Clerk: 24.

The Court: All men or women, or can you tell from reading the Japanese names?

The Clerk: They all look like men, your Honor—no, there is one Mrs. Alice something.

The Witness: I thought there were some women on there.

The Court: Can you tell?

The Witness: Not by reading the names, no.

The Court: Let me see it.

(The document referred to was passed to the Court.)

The Court: It appears to be men and women. I see Mrs. K. Iseri, and Miss June Murakami, and Miss Ryo Kashiwagi, and Mrs. Mabel Ota, and Mrs. Alice Jino, Mrs. Eddie Imazu—it appears to be equally divided. It is dated on or about 12/24/46.

Where did you get those names?

The Witness: I got those from a Japanese minister, preacher. [274]

The Court: All right, Mr. Garrett. Go ahead.

Q. (By Mr. Garrett): Are there any other lists which you have submitted but which have not yet been used?

A. You mean that I have submitted to the clerk?

Q. Yes, that is, within this year 1947.

A. And haven't been used?

Q. That is correct.

A. I wouldn't know if I submitted them to the clerk.

(Testimony of Arvin H. Brown.)

Q. Have you submitted any others besides this 4-L which has not been produced here in the year 1947?

A. I haven't produced any in 1947. I haven't submitted any to the clerk.

Q. When was this last list, which is now known as 4-L, when was it submitted?

A. Was this the Japanese list?

Q. Yes.

A. I haven't got the exact date for that, but I think it was just a limited number of months ago.

The Court: It says on this statement here, "Mailed questionnaires 12/24/46, and placed in box 1/2/47," so I guess they are in the master box. We will have the clerk explain that later on.

Incidentally, the Japanese list has 12 men and 12 women, or at least 12 people whose names begin with Mr. and 12 whose names begin with Miss or Mrs. [275]

Mr. Garrett: Yes, I recognize the fourth name on that list, I believe.

Q. May I ask, with respect to this list of Japanese names, Mr. Brown, what you did in connection with that list beyond delivering it to the clerk?

A. What I did with it?

Q. Did you send it to the clerk?

A. I either sent it or probably brought it up and gave it to him.

Q. And you turned it over to him, did you?

A. Yes.

(Testimony of Arvin H. Brown.)

Q. Have you ever seen the list since?

A. Not until——

Q. Until today? A. Until today.

Q. Have you ever seen any of the names on that list in any other form, that is, on cards or on questionnaires or anything since the time that you submitted it to the clerk?

A. Well, if they are in the master box, I certainly have.

Q. But that fact, that they are said to be in the master box, is the only recollection you have on that subject, is it?

A. I wouldn't attempt to remember the names as we put them in, but I know I was there because we put them in together, and I must have seen those names. [276]

Q. That is directly from the list which you submitted? A. I beg your pardon?

Q. You submitted the list? A. Yes.

Q. To the clerk? A. Yes.

Q. Were the names put in the box at the same time?

A. Oh, no. You mean on the same day?

Q. Yes.

A. Oh, no. I could not tell you when, but they have to send out questionnaires first.

Q. Now, in all the cases of the selections from the telephone book, can you recall this, Mr. Brown: Do you recall whether or not you transcribed those names that were selected in your own handwriting,

(Testimony of Arvin H. Brown.)

or just how they were transferred to the lists which you submitted to the clerk?

A. I wrote them down and then had them typed.

Q. Now, with respect to the placing of the names in the box, Mr. Brown, what procedure did you follow in that respect, that is, with respect to placing the names in the box?

A. In the master box?

Q. Yes.

The Court: Which box, the available box or the master box?

Mr. Garrett: The master box. [277]

The Witness: Well, the tickets have already been made—I think that is the name that we talked about—which have nothing on them excepting the name. There is no address or any other information. It is a little narrow ticket. The clerk generally sends for me, or always sends for me, when it is time to put names in the box. When I get there he has the tickets all ready in bunches and when we are ready to put the tickets into the box we each take a portion of them and then alternately—I don't know which one begins first—reads the name and drops the ticket in the box. We will say the clerk starts first. Then I will read the next name and put it in the box, and so on, until those names are all placed in the box.

Q. (By Mr. Garrett): Now, when the name is read, is it read from the ticket? A. Yes.

Q. At the time this placing in the box takes place, do you have the questionnaires there also, or merely the tickets?

(Testimony of Arvin H. Brown.)

A. Well, whether the questionnaires are in the room or not, I don't know.

Q. I mean there at the point where this deposit is being made, do you have the questionnaires there?

A. You mean so we can look at them while we put the tickets in? [278]

Q. That is correct, so you can refer to them if any question arises.

A. No. I can clarify that by saying when we put the tickets in the box the only information that we have is the name on the ticket. Is that what you mean?

Q. That is correct.

The Court: You don't have the cards available or the questionnaires, or anything else?

The Witness: If they are there, we don't look at them. I don't know where they are.

Q. (By Mr. Garrett): If any question arises as to any name about putting it in the box, you then go to other records in order to check up on that name?

A. Well, I don't know what question you mean that might arise. You mean like if a person was dead?

Q. I case one or the other of you thought that there was some reason for not putting a name in the box, would there be any documents there that you could check on with respect to that name?

A. Well, the clerk could look it up on the cards.

The Court: Do you ever have any question when you go to that stage?

(Testimony of Arvin H. Brown.)

The Witness: Once in a while, but very, very seldom we would recognize the name of someone who has died.

Q. (By Mr. Garrett): With respect to the handling of [279] these questionnaires, you don't have anything to do with that, do you, Mr. Brown?

A. You mean sending them out?

Q. Sending them out or reviewing them after they are returned?

A. Yes, when they come back the clerk sends for me and we look them over.

Q. You look them over with him, is that so?

A. Yes, that is right.

Q. Thereafter do you have occasion to see those questionnaires again at any time before the time that the slips that have been typed up, or tickets, are placed in the box?

A. I suppose they would be available to me, but I never have inspected them.

Mr. Garrett: That is all.

The Court: Is there anybody else on this side of the table who wants to question the witness?

Mr. Margolis: No questions.

The Court: All right, Mr. Calverley.

Cross-Examination

By Mr. Calverley:

Q. Mr. Brown, do you have any particular motive in performing the services as Jury Commissioner which you performed during the past 16 years for the sum of approximately \$15 a year?

(Testimony of Arvin H. Brown.)

A. Well, I only considered it a patriotic duty. I don't know whether "patriotic" is the right word or not. Maybe it is "civic." But it was something that I wanted to contribute, and that could be the only possible motive. I don't know what you mean by "motive."

Q. Do you gain anything at all as a result of your service as Jury Commissioner from a material standpoint except the \$15 a year you receive, or approximately that?

A. I will say for accuracy that I haven't gained that because I used to give that to the young lady who typed the lists. I am not complaining, but I am out of pocket because in the early days I purchased lists with my own money, so I haven't gained anything.

Q. Is that true during all the 16 years of your service? A. Yes, that is true.

Q. Have you used the Los Angeles extended area telephone directory continuously since the beginning of your service as a source for prospective jurors?

A. No, I can't say that I have from the very beginning.

Q. When did you start using it, as best you recall?

A. I am sorry to say I can't tell you, but I think it was quite a number of years ago.

Q. Have you, Mr. Brown, ever intentionally and systematically discriminated against any individuals whose names you placed [281] on any of the prospective juror lists on the ground that he was a laborer working for wages by the day?

(Testimony of Arvin H. Brown.)

The Court: Or hour.

Mr. Calverley: Or hour.

The Witness: Never.

The Court: Have you ever left any name off on any ground of occupation or pay or rate of pay or time of pay, or whether they were paid at night or by the hour or by the day or by the week or by the month? Have you ever left any name off on that account?

The Witness: Never.

The Court: Have you any way of knowing whether or not a man's name in the telephone directory, or any of these other places, whether or not they are paid by the day or hour or if they are paid at all?

The Witness: I have no way of knowing.

Q. (By Mr. Calverley): Have you ever left any man's name or anyone's name off the list on the basis of his or her race? A. No.

Q. Have you ever left the names of any prospective jurors off the list because they were businessmen or independent businessmen? A. No.

The Court: Or employees of corporations?

The Witness: I wouldn't know.

The Court: Or labor unions?

The Witness: You see, in these telephone books I wouldn't know who they were.

Q. (By Mr. Calverley): Have you ever followed any standard of discrimination against prospective jurors on the basis of their occupation or the way they earn their living? A. Never.

(Testimony of Arvin H. Brown.)

Mr. Calverley: That is all, your Honor.

The Court: Any other questions?

Mr. Margolis: No further questions.

Mr. Calverley: Just one other, if the Court please.

Q. Mr. Brown, you served as Jury Commissioner during the term of office when Mr. R. S. Zimmerman was clerk of this court, is that right.

A. Yes.

Q. Did you ever see any list of names in the possession of Mr. Zimmerman or of any discussion with him that had been obtained from the Central Labor Council?

A. Well, I haven't anything but a vague impression about that, that he had obtained some names.

Now, I want to be specific. When you asked me previously if I was Jury Commissioner during his term, that is not quite accurate, because he was clerk, I don't know how long before I came in as Jury Commissioner. [283]

The Court: He was clerk part of the time?

The Witness: That is right. But during the last part of his term I was Jury Commissioner.

I have a faint recollection, but I couldn't testify to anything definitely in a definite way, about that.

The Court: What is your best recollection?

The Witness: Well, my best recollection is that he had obtained some names from the Labor Temple.

Q. (By Mr. Calverley): Is that the Labor Temple in Los Angeles?

(Testimony of Arvin H. Brown.)

A. I don't know. I should think it would be.

Q. Mr. Zimmerman is now deceased, you know that, do you not? A. Yes.

Q. Do you recall the date of his passing?

A. No, I don't.

Q. It was prior to 1942, is that true?

A. I should think so.

Mr. Calverley: That is all, your Honor.

* * *

WILLIAM S. ROBINSON

called as a witness by and in behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name, sir?

The Witness: William S. Robinson; R-o-b-i-n-s-o-n.

The Clerk: And your address?

The Witness: 2736 Tilden Avenue.

Direct Examination

By Mr. Margolis:

Q. Dr. Robinson, what is your business or occupation?

A. I am Assistant Professor of Sociology at the University of California at Los Angeles.

Q. How long have you been at the University of California? A. Four months.

Q. In that capacity? A. Yes.

Q. What education have you had, Doctor?

A. I have an A.B., M.A. and Ph.D.

(Testimony of William S. Robinson.)

Q. In what subjects?

A. My A.B. was in English, my M.A. was in Sociology, and my Ph.D. was in sociology and statistics.

The Court: Where?

The Witness: Columbia University.

Q. (By Mr. Margolis): Your Ph.D. is in sociology? A. Yes.

Q. And statistics? A. That is right.

The Court: Where was your A.B. from?

The Witness: My A.B. was from the University of California, and my M.A. and Ph.D. from Columbia University.

Q. (By Mr. Margolis): What work have you done in the statistical field?

A. Until this summer I was Assistant Professor of Statistics and Sociology in the graduate faculty of Columbia where I taught statistics for one thing.

Q. For how long did you hold that position?

A. For eight years.

Q. Go on.

A. And my statistical work, in the main, has been——

* * *

My statistical work outside of teaching has come, in the [286] main, from two things: I was chief statistician of the Columbia office of Radio Research, now called the Bureau of Applied Social Reference, for some seven years. The rest of it has been as consultant.

(Testimony of William S. Robinson.)

Q. (By Mr. Margolis): Before you go on with the consultant phase, will you tell us the nature of your work in charge of that department, or assistant in charge of that department?

A. Yes. It consisted in supervising all the statistical work of the Office of Radio Research, the planning of studies through their prosecution to the analysis of the data and writing of reports.

Q. Can you give us the nature of statistics that you dealt with? Did you deal with statistics dealing with people?

A. Of all sorts. In my period we were mainly doing war research, with a contractual arrangement with the Bureau of Census, the Office of War Information, etc. So I handled a variety of statistics, whatever I was given to deal with.

Q. Give us some examples.

A. One of the things we did was to prepare tests for foreign language propaganda broadcasts for the foreign division of the OWI, the major problem being to take a canned broadcast and give it to a foreign language group in this country and from their reactions redesign it so as to do a better job before it was finally broadcast to a foreign [287] country.

Q. That was determined on a statistical basis?

A. Yes. The major problems involved were those of designing an experiment to carry out a given purpose, devising scales to quantitatively record the reactions of individuals, devising tests of significance to determine their likelihood of occurring again. It was mostly mathematical problems.

(Testimony of William S. Robinson.)

Q. Now, you say you have acted as consultant with relation to certain statistical jobs or problems?

A. Yes.

Q. Give us some examples of that.

A. You mean the names of people for whom I have worked?

Q. Names of people, nature of jobs, and so forth.

A. Columbia Broadcasting System, National Broadcasting Company, the Princeton Radio Research Project, Rockefeller Foundation, E. I. de Nemours Dupont & Company, Time Magazine, Fortune Magazine, more particularly the Fortune Poll, War Production Board, Army Service of Supply, Office of War Information, United States Bureau of Census—that is all.

Q. Can you tell us some of these projects on which you were consulted, as to what they related to?

A. I was consulted by the Dupont Corporation as to whom to give slips to test so they could guarantee so many washings. [288]

The Court: So many washings?

The Witness: Yes.

The Court: You mean like Duz, soap, you mean?

The Witness: Exactly. The Dupont Corporation will guarantee to manufacturers that a slip of a certain variety will, let us say, stand 47 washings by a laundry.

The Court: Slip?

The Witness: A woman's slip. And the way they determine that is to give, say, 5,000 slips to

(Testimony of William S. Robinson.)

their employees scattered over the country and have them wear them and wash them. They were spending about \$60,000, as I remember, for determining this for each model, and they wanted to know how to do it more cheaply. It was a problem of how to pick people and kinds of washings, and so forth, so as to get the indication of the effect with the smallest number of slips.

I mention that to be facetious, since it is of no particular importance.

Then for the Bureau of the Census, for example, I worked during the war on a sample census of the United States to collect information of use to the war effort.

For the War Production Board I worked on a special cross-section sample of the United States for determining the needs of consumers during the war, determining the sort of things that caused most of their gripes, let's say.

Q. (By Mr. Margolis): I wonder if you can turn now to [289] the Fortune Poll?

A. I was consultant to Elmo Roper, who is the director of the Fortune Poll, in the sampling techniques, mathematics. If he had a special or particular problem out of the ordinary run, he would ask me, that is, involving knowledge of mathematical sampling procedure, he might consult with me as to that.

The Court: What do you call mathematical sampling procedure?

The Witness: Discussions such as I have heard here of random selection from telephone books.

(Testimony of William S. Robinson.)

The Court: What did you do?

The Witness: I will give you one example.

The Court: What is this phrase you used? It has escaped me.

The Witness: Randon?

The Court: No.

The Witness: Mathematical sampling techniques?

The Court: Yes, mathematical sampling techniques.

The Witness: Perhaps I can give you a rough idea of it by giving you a specific example.

In the 1940 election, Life Magazine decided to study the election, so to speak, as to the casual factors involved. They hired the Office of Radio Research to do the job. They picked Erie County on which to do the job. They hired Elmo [290] Roper and his interviewers to do the interviewing in the field in Erie County during the election campaign. Mr. Roper knows very well how to select samples on a nation-wide basis, but he didn't know how to select a sample from a county of some 30,000 or 40,000 people. So he asked me how to do it. You don't do it in the accustomed way, you don't do it in the way you select samples on a nation-wide basis.

Q. (By Mr. Margolis): Perhaps you should tell us what you did.

The Court: That is what I am trying to get at, what you did to accomplish this with the mathematical sampling technique.

The Witness: My functions, just to speak——

The Court: In that one case?

(Testimony of William S. Robinson.)

The Witness: I will tell you, but I would like to preface it so you will know what I am talking about.

My function is to see that the way a sample is taken corresponds to the mathematical sampling technique. The purpose of a statistician is to tell anyone who wants to take a sample how to take it so that it will behave as self-respecting samples do. In other words, so that it will behave as to the mathematical theory of samples. In other words, so it will give you a good estimate of what you are trying to estimate.

The Court: Yes. Now, what did you do back in this county of 30,000 or 40,000 in your mathematical sampling [291] technique?

The Witness: I had an airplane map made of the entire county. I divided every road into very small segments. I numbered the segments.

Then using what is called a table of random numbers, I picked 400 of those samples, those sample road segments, and told Mr. Roper to have his interviewers interview everybody who lived on those segments on both sides.

The Court: Yes?

The Witness: That is what I did.

The Court: That was all you did?

The Witness: That was all I did.

The Court: Then he had them interviewed?

The Witness: Yes.

The Court: And what happened?

(Testimony of William S. Robinson.)

The Witness: They forecast the election within the experimental error in that county.

The Court: In that county?

The Witness: Yes.

The Court: What was the name of that county again?

The Witness: Erie County.

The Court: How did his forecast come out?

The Witness: Very well.

The Court: What percentage was he off?

The Witness: That, if I may say, is irrelevant.

The [292] question is, was he off—

The Court: I am glad to know that.

The Witness: It is irrelevant from a statistical standpoint. The question was, was he off more than his predicted error, and he was not.

The Court: How much was he off?

The Witness: I don't know.

The Court: You don't know?

The Witness: No.

The Court: Whether it is irrelevant or relevant.

The Witness: No.

The Court: You don't know how much he was off?

The Witness: No, but I know that he was within the margin of error that I specified. He would be.

The Court: What margin of error did you specify?

The Witness: I don't know. I can look it up.

The Court: You don't remember that?

The Witness: No.

The Court: I see. Go ahead.

(Testimony of William S. Robinson.)

Q. (By Mr. Margolis): In this process of selecting numbered areas after preparing this map, is that just something that is done at random, or is there a definite, scientific way of doing it?

A. The word "random" has a particular meaning to anybody who takes samples professionally. It doesn't mean picking with no conscious bias; it means picking mechanically either by throwing dice, expensive dice, or preferably by using what is called the table of random sampling numbers.

The Court: Aren't all dice expensive?

The Witness: They aren't necessarily to the purchaser.

The Court: You made reference to this airplane map. Why did you take an airplane back there to pick out these segments? Was it to get the density of houses, is that it?

The Witness: No. Do you mind if I take the time to go into it in detail?

The Court: That is the idea.

The Witness: A sample is a group of cases or observations taken from a much larger group of observations about which it is desired to know something. That larger group of observations is called the population or a universe. The idea is, you take some cases to sample and they will tell you something about all the cases, the population. Mr. Roper takes 5,000 interviewers from people who are of voting age and have the proper qualifications for voting. He thereupon says the voting population of the United States, some 40 million, will vote 52 per cent Roosevelt, as my sample did.

(Testimony of William S. Robinson.)

Now, when you select a sample it has to be selected so that you can make forecasts of that sort reliable. It isn't necessarily true—it is almost in fact never true—that if you take a sample and compute, let's say, the percentage of [294] Democrats in it, the percentage of Democrats in the population from which the sample was taken is the same.

In other words, if you were to take many samples from a population, those samples of Republicans or Democrats would vary from sample to sample. Now, that variation, providing you take your sample in a particular assigned way, can be estimated when you take the sample by the theory of probability. I can give you another example of that.

If you toss a penny 50 times in the air, if you toss it so that it turns over and over so I am assured you cannot predict which way it will fall, or control it, and if furthermore you catch it in your hand and not let it roll on the floor, I will give you limits within the percentage of heads will lie in 50 throws or any other number of throws. And if you care to try me, I will do it.

But that is only because you have tossed the penny well over and over again. That assures randomness in your result. Were you able to control it, whether you could get heads or tails, naturally my prediction would be wrong.

The Court: That is the same person tossing the same penny?

The Witness: Any penny.

The Court: Or 50 people tossing the same penny?

(Testimony of William S. Robinson.)

The Witness: It would work just as well, but only because they toss it well, that is, what I am trying to get at, [295] because it goes over and over and over. It gives you what is called random results.

Likewise, there are ways of picking, let's say, 50 people from a large population which will give you very biased results.

The Court: Of course, there is a certain amount of force with which that penny must be tossed, and if you watch the number of times you can tell how many times it turns over, and so forth?

The Witness: Providing you throw it high enough so that you cannot do that or control it. If you would care to try it, I will do so.

The Court: Different people will toss it at different rate of speed also.

The Witness: That is true, but as long as they do not control it, as long as they flip it well. It has been experimentally observed as a fact, and there have been hundreds and thousands of coin throws to show that it can be done.

The Court: But in the penny-pitching example, there isn't the human element involved? You eliminate that there, don't you?

The Witness: Yes.

The Court: As much as you can?

The Witness: Yes, that is right.

The Court: All right. [296]

The Witness: Now, in picking a sample from a population, the attempt is made to eliminate the

(Testimony of William S. Robinson.)

human element as well. It is experimentally observed for example, that no one can pick out of a group and not pick with a bias. I can cite you at least a hundred references, not out of my head but out of my files, for that. Scientists who measure pointer readings and record simply the numbers which are recorded on a dial consistently get numbers which are biased. That is, if you take the minimum temperature readings for a given operator who reads temperature every night, you will find that he has ten times as many zeros and fives and sevens maybe as all the rest of the numbers together. There is no such bias in his observations. You get biases even in reading scales. No one can pick numbers on a page, from page after page after page, without some kind of bias as to position on the page. That has been demonstrated very adequately.

No one can even pick digits, let's say the numbers zero to nine, out of his head at the click of a metronome, and so forth, without a bias.

The Court: When you are saying "bias," you mean a habit of thought?

The Witness: A habit of thought which causes you to select one kind rather than another. Consequently, it is never safe in taking a sample to take it by picking its members, even if you try to do it at random. It must be done, if [297] you are to believe in your results and if your results are to be verified, by taking the members of your sample from your population by a purely mechanical pro-

(Testimony of William S. Robinson.)

cess in which no judgment whatever is involved. You can do it by flipping a coin, if you are careful to flip it well; you can do it by throwing dice, if you are careful that the dice are good dice and you don't throw them on a mohair surface, because the holes in them will give certain bias in your result. Best of all, the accepted procedure is to use the table of random numbers. It is a table of digits from zero to nine some 10,000 or 100,000 of them, which have been checked in various ways, but they have been shown to be random already.

The Court: Now, is that how you happened to pick these sections by airplane?

The Witness: That is why I numbered the segments.

The Court: Why did you pick them?

The Witness: I wanted them random. If you don't pick in a way that corresponds to chance——

The Court: You had an airplane map made of the whole county and then divided that up into squares?

The Witness: It was simply devised to get at the roads.

The Court: You divided that up into squares and then numbered the squares?

The Witness: No, I didn't divide them into squares, because that presented administrative difficulties. I traced [298] all the roads over with a pencil and divided them into short strips.

The Court: You divided the roads into short strips?

The Witness: Yes.

(Testimony of William S. Robinson.)

The Court: And then numbered those?

The Witness: Then numbered those segments.

The Court: Consecutively?

The Witness: Yes, beginning arbitrarily at some point.

The Court: Beginning at random?

The Witness: Oh, no, I didn't, and I don't need to.

The Court: Why did you begin where you did begin?

The Witness: Because it was convenient to.

The Court: Because it was convenient?

The Witness: Yes.

The Court: Only?

The Witness: I began in the lower left-hand corner.

The Court: Then you numbered all of those consecutively?

The Witness: 4,096, as I remember it.

The Court: Then you applied to that what you call your random number, is that what you mean?

The Witness: Table of random numbers, or random sampling numbers.

The Court: Table of random numbers or random sampling numbers?

The Witness: That is right. [299]

The Court: And then you picked which ones?

The Witness: If you insist upon knowing, I took blocks of four digits from that table. The tables are arranged in rows and columns. I took the first four columns of digits. The digits come in random order, as I say.

(Testimony of William S. Robinson.)

Let's suppose that the first four digits in that table were 6792. All right. I just threw that out because it didn't match my zero in the 4096 from my road segments. Whenever I four four digits which corresponded to my number 4096 I took that road segment, with that number as one member of my segment of road samples.

The Court: The reason you took a road is because people live near the road?

The Witness: Exactly. It was just a way of dividing my population into very small groups of people which could be numbered and identified in the field as belonging to groups of different numbers.

The Court: All right.

The Witness: I selected a number of those groups of people at random, strictly mechanically, and those people constituted the sample.

The Court: How many? You said he sampled 5,000 people.

The Witness: No.

The Court: How many squares did you have?

The Witness: I had segments. [300]

The Court: How many segments did you have in that county?

The Witness: As I remember, there were 4,096.

The Court: And you sampled 5,000 people?

The Witness: Not 5,000. That was in reference to the sample Mr. Roper takes on a nation-wide basis to forecast an election.

The Court: How many of these segments did you have him sample?

(Testimony of William S. Robinson.)

The Witness: I picked the number which would give me, from rough estimates, the proportion of people in the country that we wanted, or the total number of cases that we wanted in our sample, which happened to be 3,000.

The Court: 3,000?

The Witness: I think it involved 200 road segments, but I am not certain.

The Court: About 200 road segments, and you estimated 3,000 people?

The Witness: That is right.

The Court: In that county of 30,000 to 40,000 people?

The Witness: That is right.

The Court: Or about 10 per cent of the population?

The Witness: That is right.

Q. (By Mr. Margolis): You did a similar consulting job for Life Magazine, did you not? [301]

A. This was in connection with the Life study of the 1940 election.

Q. Was that a similar type of job?

A. It was the same one. Life, let's say, financed the study, at least financed it in part, and the Rockefeller Foundation financed it in part. Mr. Roper was hired to do the field work and the Office of Radio Research was hired to do the planning work and the analysis work.

Q. Have you done any writing on the subject of statistics?

(Testimony of William S. Robinson.)

A. Yes. I have a contract for a book on statistics with Houghton, Mifflin & Company, of which I have written some 900 pages.

The Court: Introduction?

The Witness: Well, there are 2500 pages called for all together.

I have also written a number of articles, but, in the main, what I write in the technical field of statistics are in various governmental agency files because most of my writing was done during the war and on specific jobs. [302]

Mr. Janney, will you come forward, please?

VERNON W. JANNEY

called as a witness by the Court, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, sir.

The Witness: Vernon W. Janney, J-a-n-n-e-y.

The Clerk: Take the stand, please.

Direct Examination

By the Court:

Q. You are the Assistant Secretary and Assistant Jury [308] Commissioner of Los Angeles County, Superior Court?

A. Yes, sir.

Q. You came over this morning in response to my telephonic request? A. Yes, sir.

Q. Concerning the method of selecting juries for the Superior Court of Los Angeles County?

A. Yes, sir.

(Testimony of Vernon W. Janney.)

Q. This is the nisi prius court and court of general jurisdiction in the State of California for matters over \$2,000 and other matters?

A. Yes, sir.

Q. Will you state, if you can, as briefly as you can, your method of selecting jurors?

A. We try to draw our jurors from the entire County of Los Angeles.

Q. Let me suggest this. You state how you have selected the current jury and then we can determine whether that is a pattern.

A. All right.

This jury list we filed on February 1st was selected in this manner. We receive from the registrar of voters the entire voters' registration in the precinct sheets. We took each fifth precinct, in other words, we took 1, 6, 11, 16, and so forth. [309]

Then the precinct sheets that we selected, we took each ninth name, we checked each ninth name, and from the names that were checked we then mailed a letter directing them to report to the Secretary's office for examination.

Q. Do you have a form of that letter?

A. Yes, sir.

Q. You also have one precinct sheet there, have you?

A. Yes, sir.

Q. With the names checked on it?

A. Yes, sir.

Q. Very well.

We will just mark those here in evidence.

The Clerk: As government's exhibits?

Mr. Calverley: That is agreeable.

(Testimony of Vernon W. Janney.)

The Court: This will be Exhibit 5-A, form of letter will be 5-B.

(The documents referred to were received in evidence and marked Government's Exhibits Nos. 5-A and 5-B, respectively.)

Q. (By the Court): How many names did that method secure for your current juries to whom you mailed the letters?

A. We mailed out 33,000 letters. Of the 33,000 letters, 2,760 of them were returned as undeliverable.

We had 12,274 letters of correspondence, either asking to be excused or deferred. [310]

Q. Those who asked to be excused, they were among the exempt classes?

A. Yes. They were doctors and lawyers and persons in poor health or at an age that would disqualify them, or women with children and no one to take care of the children.

Q. In other words, they fell in the class which, by California law, are exempt from jury service?

A. Yes, sir.

Q. Now, in sending the names out in your current list to the voters registered, the voters' list does not indicate the occupation?

A. No, sir; not now.

Q. So you cannot determine from the voters' list whether that person would or would not be exempt?

A. That is right.

Q. Previously the list did contain the occupation?

A. Yes, sir.

(Testimony of Vernon W. Janney.)

Q. And when you sent out the cards, then you skipped——

A. If a name was checked and it was someone that was exempt, we took the following name.

Q. Very well. Proceed.

A. There were 9,871 who were excused at the desk, the first desk as they come in where they present their letter, and if they wish to be excused they state their reason. If the reason is obviously valid, the secretary there excuses [311] them on an affidavit form.

Q. That is to say, if a person is obviously blind, for instance?

A. Yes, or if they cannot read nor write, or if they have a doctor's certificate, or something of that nature, we excuse them on this affidavit form.

The Court: This affidavit form will be Exhibit 5-C.

(The document referred to was received in evidence and marked Government's Exhibit 5-C.)

Q. (By the Court): Proceed.

A. Then those that are not excused are given a questionnaire to fill out. This questionnaire gives us a pretty good picture of the person from the health standpoint, whether they have served in a court of record in the previous two years, whether they had been convicted of malfeasance in office or any felony or other high crime.

We ask them if they will support the constitution,

(Testimony of Vernon W. Janney.)

what their occupation is, by whom they are employed, and general information of that nature.

Q. Do you have that blank form there?

A. Yes, sir.

Now, the other part of the questionnaire tells us whether or not they have a working knowledge of the English language. The other two parts of the questionnaire give us an idea of their ability to think. [312]

Then this questionnaire is returned to another desk where it is graded and it comes to the Jury Commissioner or the Assistant Jury Commissioner.

Q. Now, those tests there that are calculated to determine whether or not they have a working knowledge of the English language and of their ability to think, were they devised by some educational institution or some professor of sociology?

A. Yes. This was set up in 1936 by qualified men. I cannot at the moment tell you who they were, because I wasn't there and I don't know, but they were selected by the court.

Q. Were they judges, lawyers or teachers?

A. Professors and psychologists, and I think one was a businessman. It was all done under the guidance of a committee of the Superior Court judges.

Q. Very well. Now, you have that blank form there? A. Yes, sir.

The Court: This will be the next in order, 5-D.

(The document referred to was received in evidence and marked Government's Exhibit No. 5-D.)

(Testimony of Vernon W. Janney.)

The Witness: Now, from the questionnaires presented the Jury Commissioner or the Assistant Jury Commissioner, there was a total of 2,863 excused, and there were 3,705 approved. [313]

Q. (By the Court): For service out of the 33,000?
A. Yes, sir.

Now, then, if there is a number of names that have not been drawn from the previous list—and in this case there were 966—we correspond with them and ask them if they could serve at this next term, and of the 966 we had 322 that replied they could and would.

Q. And who had been previously qualified?

A. Yes, sir.

Q. Have you made some calculations of the cost to the county?

A. There is the letter that we send out asking those people. That is one that has been used. We did not have an unused one.

The Court: Very well. This will be Exhibit 5-E.

(The document referred to was received in evidence and marked Government's Exhibit No. 5-E.)

The Witness: We have estimated what the cost is of our jury operations. This is only an estimate, because our office has two functions, one being that of the Jury Commissioner and one being that of the Secretary of the Courts. The functions overlap and therefore it is almost impossible to get an exact break-down of our costs, but I think these are fairly accurate.

(Testimony of Vernon W. Janney.)

Q. (By the Court): Let us break it down into some unit. [314] You have broken it down into the cost per qualified juror, have you not?

A. Yes.

Q. What is your estimate of that?

A. The cost per qualified juror would be \$2.30 per qualified juror. It cost us \$9,172.50 to obtain 4,000 names.

Q. That is the system you have followed for some years?

A. Yes; we have been following this system since 1936.

Q. And the number of names qualified each time approximates the same, about 10 per cent?

A. Yes. Roughly, we estimate about 10 per cent of the letters we mail out we will receive in qualified jurors.

The Court: Very well. Any questions on the part of either counsel?

Mr. Kenny: I have just one question, your Honor, and this goes to—I take it this is an administrative feature?

The Court: As long as we are making a record, we might as well make it.

Mr. Kenny: Yes.

Cross-Examination

By Mr. Kenny:

Q. Would the attitude of your department be favorable to legislation—it would have to be joint state and federal legislation—which would permit your department to furnish [315] at cost to the fed-

(Testimony of Vernon W. Janney.)

eral jury system, jurors obtained in this way? In other words, what I am suggesting——

The Court: I think that is material, in view of the comments in the Thiel case, that the court should always be alert to find a better way.

Mr. Kenny: That is right.

The Witness: Well, I couldn't answer that, because the policy of our office is dictated by the judges of the Superior Court.

Q. (By Mr. Kenny): It would, Mr. Janney, serve, though, to cut down your general overhead without any increase of operation, if such legislation were passed so that the duplication and selection between federal and state juries was removed and you more or less wholesaled out the jury selection?

A. Yes, it could be done, but not under the present conditions, because of working space. We are under-staffed now, and it would be impossible.

The Court: I think what Judge Kenny is referring to is this, if in this court there were the current term we are presently using—what, about 839 names?

Mr. Hocke: We haven't used that many yet, your Honor.

The Court: You have that many in the master box that you have drawn?

Mr. Hocke: That is right.

The Court: And you figure they may be drawn during this [316] next term of court?

Mr. Hocke: I think they have all been drawn out but not all returned yet.

(Testimony of Vernon W. Janney.)

The Court: Assume that there should be 800 during the term of court, the idea is whether or not it would be feasible, instead of the Federal Court securing a list of jurors, that the clerk if this court would simply call on you to draw out 800 names and send the list over here and have him subpoena them in.

The Witness: That would cut the cost down for both, both court systems.

Mr. Kenny: When the Legislature is in session and Congress also is in session, it might be an occasion just from an administrative process.

The Court: I don't know. Maybe it can be done by rule of court.

Mr. Kenny: It might. That is all I have. No further questions.

Cross-Examination

By Mr. Calverley:

Q. Mr. Janney, you are provided with a clerical staff by the State, is that true?

A. Yes, that is true.

Q. What is the extent of the clerical staff provided you for this service by the State? [317]

A. The number of employees?

Q. Yes.

A. Directly in this jury activity, there are eight secretaries and——

The Court: Engaged full time?

The Witness: No, they are not engaged full time. There is only one person, we might say, that is engaged full time. That is one secretary.

(Testimony of Vernon W. Janney.)

The Assistant Jury Commissioner is only engaged half time, we estimate. We have eight other secretaries that we estimate are engaged half time. And I have two messengers that are engaged half time.

Q. (By Mr. Calverley): Do you pursue any other occupation other than that of Jury Commissioner?

A. No, I am Assistant Secretary of the Courts.

The Court: You are on a full-time salary? Your job is a full-time job and a salaried job paid by the State?

The Witness: That is right.

The Court: The purpose of that question is to point out for the record that the Jury Commissioner in the Federal Court has drawn about \$15 a year for his services.

Q. (By Mr. Calverley): Mr. Janney, I don't recall if you answered this question, but will you state, if you can, what proportion of the prospective jurors to whom you send out the original letters that you testified to, what proportion [318] of those to whom you send out those letters reply to them?

The Court: He testified that there were 33,000, or twenty some-odd thousand that they didn't get.

The Witness: There were only 1,527 that we hadn't accounted for by the time we filed the list, but a good part of those will straggle in over the next several months, either returned by the post office, some of them coming back from the Philippines, some coming back from Japan, some coming back from Germany, where they have been forwarded to

(Testimony of Vernon W. Janney.)

the boys in service, and some have since died. But ultimately we account for all but about 1 per cent.

The Court: Let me see. The figure that you first gave was a figure of some 2,000 who were returned deceased.

The Witness: Yes, returned as undeliverable. That is 2,760.

The Court: Then, in addition to that, there were about 1,500?

The Witness: Yes, sir.

The Court: So there is about 10 per cent of the list that either do not answer, you do not hear from them, or something like that?

The Witness: Yes.

Now, that figure will vary depending on the age of the precinct sheets that we have. When we first receive them we will have a mail return of 3 per cent or 4 per cent. By the [319] time the sheets are two or three years old we will have a mail return of 10 per cent.

Q. (By Mr. Calverley): In selecting these names from the registrar of voters' lists by precincts, I believe you testified you took each ninth name in this last impanelment? A. Yes.

Q. Do you pay any attention, or does your office pay any attention, to the occupations of the persons selected?

A. At the present time we have no way of determining what their occupation is because it isn't shown on the precinct sheets.

Mr. Calverley: That is all, your Honor.

(Testimony of Vernon W. Janney.)

The Court: Any questions, Mr. Garrett?

Mr. Garrett: Yes, your Honor.

Cross-Examination

By Mr. Garrett:

Q. Mr. Janney, I understood you to say that for the names filed in February, 1947, for the selection of those names you used precinct sheets from the registrar of voters from the county, is that right?

A. That is right.

Q. Those precinct sheets were all old sheets at that time, were they not?

A. These sheets this year were issued by the registrar of voters, I believe, last April. [320]

Q. Does he issue new sheets after the holding of a general election when the dropping of non-voting registrants occurs?

A. No, those sheets are issued prior to the general election. They have been in the past issued every two years.

The Court: And you get them every two years?

The Witness: Yes, sir.

The Court: You get a new sheet every time there is a new issued?

The Witness: Yes, sir.

Q. (By Mr. Garrett): And on general election years, the sheets are usually issued in the April prior to the general election, is that right?

A. That is right.

Q. The sheets on all precincts are not issued at the same time, are they?

A. For the entire county, yes.

(Testimony of Vernon W. Janney.)

The Court: When you say county, you mean all of the cities within the county? You do not just mean the county territory like the sheriff does when he is talking about the county?

The Witness: Well, it is every registered voter within the county.

The Court: Within the county?

The Witness: Yes, sir. [321]

The Court: Because some of the—well, all of the municipalities have separate voting sheets and separate numbers?

The Witness: Yes, sir.

The Court: Like it is Maywood 1, 2, 3, etc.?

The Witness: That is right.

The Court: Now, by the way, are your juries for the Long Beach, Pomona, Glendale and Santa Monica areas, do they come from the same list?

The Witness: Yes, they come from the same list, but we go into each of the judicial districts and qualify the jury from that district.

The Court: You mean you send out separate—

The Witness: We send out a crew to Pomona, we send out also a crew to other sections, and when we send a crew to Pomona we operate from the Pomona Superior Court for two days.

The Court: For registered voters in that area?

The Witness: For registered voters in the Pomona judicial district.

The Court: But in Los Angeles, the courts sitting in the city of Los Angeles, you likewise include those and take the whole county?

(Testimony of Vernon W. Janney.)

The Witness: We take the whole county, except we don't as a rule, go into Long Beach because we have four courts in Long Beach, and in drawing a jury for Long Beach we draw a [322] jury of about a thousand names, so that about blankets the Long Beach judicial district.

But we do draw for the—we do take people from Long Beach and we do have Long Beach people on the list, but we don't go into Long Beach to draw them. They are people that have moved from Los Angeles to Long Beach and are willing to serve in Los Angeles. Most people would prefer to serve that are living in the Long Beach judicial district in Long Beach because of the transportation.

Q. (By Mr. Garrett): There are people that are on your general mailing but when they come in you find that they are either living in the Long Beach area or have moved there and would prefer to serve there, is that correct?

A. Yes. And if they are within the judicial district, we put them on that list at their request.

Q. Now, you sent out 33,000 letters for this February list, as I understand it.

A. Yes, sir.

Q. And those 33,000 letters were taken from the registrar's lists after they had been arranged in numerical order and every fifth list taken out, is that correct?

A. Yes. We take each fifth precinct. They, for instance, we are just starting, we will take 1, 6, 11, 16. After we have gone through the entire count,

(Testimony of Vernon W. Janney.)

then we will take 2, 7, 12, 17. Then the next time we go around we will take 3 [323] 8, 13, and so forth, so theoretically we blanket the entire county.

Q. In succeeding years? A. Yes.

The Court: On each call?

The Witness: On each call we blanket the county. Ultimately every person in the county, if the voters' registration list were static and didn't change, ultimately every person in the county would be called by our office, but the list changes so there may be some people that might not be called because their names have been skipped or because the list has changed.

Q. (By Mr. Garrett): But what I am trying to get at is a situation in respect to the February, 1947 names, on which you sent out the 33,000 letters. A. Yes, sir.

Q. Now, they were sent out after an election which was made from a complete set of precincts lists for the county furnished by the registrar, were they not?

A. Yes, sir; that is right.

Q. And that selection resulted in your taking out every fifth list for the selection of names therefrom, is that correct? A. That is right.

Q. Now, as I understand it, only the precinct list is [324] selected for that operation of selecting every fifth one which had names drawn from them for this February, 1947 list, is that correct?

A. That is right.

Q. And after taking out from the complete lot

(Testimony of Vernon W. Janney.)

of lists of the registrar arranged in numerical sequence, every fifth one of those lists, you then proceeded to select a certain name on each of those lists so selected, is that right? A. Each ninth name.

Q. And that was the ninth name?

A. That is right.

Q. That wouldn't produce 33,000 names, would it?

A. Yes. The average sheet is about 350, so you take each ninth name and you have one-ninth of 350 off of each sheet.

The Court: How many precincts in the county?

The Witness: There are about 3,300, I believe.

The Court: In the county?

The Witness: Yes, sir.

The Court: I thought there were 4,000 in the city, or something like that.

The Witness: No, no. Judge, you are right. I think there is 3,300 in the city alone.

The Court: In the county all together how many are there?

The Witness: I don't know how many. [325]

Q. (By Mr. Garrett): There are about 5,000-precincts in the county? A. I don't recall.

Q. Let's assume there are. A. Yes.

Q. So I can get to the point of my question.

A. All right.

Q. How could you get 33,000 names by selecting one name from each of 5,000 lists?

The Court: He doesn't. He picks every ninth name.

(Testimony of Vernon W. Janney.)

The Witness: Each ninth name.

The Court: Look at your exhibit. He has them all checked here.

Q. (By Mr. Garrett): It is not only name No. 9. but it will be No. 18 after that and 27 after that, is that correct? A. Yes, that is right.

Q. Now, you spoke of receiving 12,274 letters of correspondence as the result of this mailing, is that the correct figure? A. Yes, sir.

Q. Were those letters written in reply to your letters by the addressees of your letters?

A. Yes.

Q. And there were besides the 2,760 returned as undeliverable about 1,500 that had not been accounted for, is that [326] correct?

A. That hadn't been accounted for on February 1st; yes.

Q. May I call this to your attention, 2,760 returned as undeliverable and 1,500 unaccounted for, and 12,274 reply letters, that adds up to about 16,000 as against your 33,000 letters that were sent out. So there were approximately 16,000 of those letters that you sent out that you never heard from again, I assume?

A. No. There were 12,000 of them that corresponded with us and we answered them and either told them to come in or excused them.

Q. What did you do about those addresses among those of the 33,000 letters whose letters were not returned as undeliverable and whom you have not listed as unaccounted for and who are not in-

(Testimony of Vernon W. Janney.)

cluded in the 12,274 who replied? That looks as you didn't get replies from about 16,000 of your addressees, is that correct?

A. No, we did get replies from 12,274 and the postman delivered back to us 2,760 that couldn't be delivered because the people had moved from the city or they were not known at that address

Q. And you say you have 1,500 that you can't account for.

A. 1,527 unaccounted for as of February 1st. A year from now, if they haven't been accounted for we will send them [327] a registered letter?

The Court: Mr. Witness, you have that tabulated out there, haven't you?

The Witness: Yes.

The Court: Maybe is counsel would just look at this sheet—is this an extra copy, this one sheet?

The Witness: Yes, sir, that is an extra copy. The only sheet I haven't an extra copy of is the cost sheet.

The Court: Do you wish to look at this? This breaks it down.

Mr. Garrett: Thank you.

The Court: He has indicated stragglers there, and that, as I understand his testimony, is the 1500, or the portion of the 33,000 that are not accounted for, either not returned undeliverable, haven't answered by correspondence, or haven't personally appeared.

Mr. Garrett: Yes. The difference came into the office without reply.

(Testimony of Vernon W. Janney.)

The Court: Yes. In other words, about 16,000 of them showed up.

Mr. Garrett: I understand now.

The Court: This you can mark next in order, 5-F.

(The document referred to was received in evidence and marked Government's Exhibit No. 5-F.)

Q. (By Mr. Garrett): Did that figure of those that you [328] sent letters to asking whether they could serve, will you give me that figure again? I have it here as 966, but I am not sure.

A. 966 names were not drawn from the wheel in the previous year. Those people we corresponded with asking them if they could serve, and we received, I believe, 322 replies who answered yes, they would serve.

The Court: Are jurors in the Superior Court excused after 20 days of actual service?

The Witness: 20 days of actual service, or if they are in business and request it, a judge will excuse them after they have been on the list for 30 days.

The Court: That is, they have a period for 30 days?

The Witness: For one month they have answered the calls for a month's period.

The Court: But not called?

The Witness: But may not have served their full 20 days.

(Testimony of Vernon W. Janney.)

The Court: When you get these 10 per cent of the names who are qualified, you from time to time send out letters for them to report?

The Witness: When we compile a list it is turned over to the County Clerk and the County Clerk, the judge and the sheriff send out the names that are drawn, and they are directed to report on a specific date by registered mail.

The Court: And they stay there until they have served [329] 20 days in the trial of a case?

The Witness: Yes, sir.

The Court: Or until at the end of 30 days whether they have served at all or less than 20 days?

The Witness: That is right.

The Court: Upon request of a judge they may be excused?

The Witness: That is right.

Mr. Garrett: I just have one other question.

Q. In sending out the letters from the selected precinct sheets, do you, under your system, indicate by a checkmark or otherwise on the precinct sheet the fact that the original letter to the voting registrant has been sent out?

A. Yes, each precinct sheet.

The Court: Like this one that you put in evidence here?

The Witness: Yes, sir.

The Court: Which has a checkmark after each name?

The Witness: Yes.

(Testimony of Vernon W. Janney.)

Q. (By Mr. Garrett): Are those precinct sheets retained until new precinct sheets are issued?

A. That is right. This one here is one that we just used.

Mr. Garrett: Thank you. That is all.

The Court: One other question: From this pool of jurors you call both the civil and criminal jurors of Los Angeles County? [330]

The Witness: Yes, sir.

The Court: For the trials held in the city of Los Angeles?

The Witness: Yes, sir.

The Court: Mr. Margolis, do you have any questions?

Mr. Margolis: No questions.

The Court: Any other questions?

Mr. Calverley: No questions.

The Court: Thank you very much, Mr. Janney.

(Witness excused.)

WILLIAM S. ROBINSON

the witness on the stand at the time of recess, resumed the stand and testified further as follows:

The Court: Mr. Robinson, you were sworn yesterday.

The Witness: Yes.

The Court: In connection with your motion to dismiss, I understand from the questions that were asked the Jury Commissioner yesterday and the avowals that were made by Mr. Garrett, that some

(Testimony of William S. Robinson.)

point will be made of the fact that the persons selected from the Southwest Blue Book lack that degree of impartiality required by the Constitution to be a juror.

Mr. Margolis: That is not our point at all, your Honor. The point is that by selecting—— [331]

The Court: That because they do not have any longshoremen on it, they are disqualified to try this case?

Mr. Margolis: That is not a way of getting a cross-section of the community.

The Court: But reducing it down to what you are actually getting at, it is that there are no longshoremen in that book, or no persons who work by the day, or no people who labor, and therefore they are disqualified.

Mr. Margolis: No.

Mr. Garrett: If your Honor please, since your Honor has referred to me, I should perhaps answer your Honor's inquiry.

The Court: Let me continue my statement first.

The Constitution requires that people tried by jury should be tried by an impartial jury. It is just as essential that you be tried by an impartial judge. My attention was called to the fact yesterday that my name is listed in the Southwest Blue Book. If therefore you intend or expect to make a point that the persons whose names are in that Blue Book are not impartial, I think perhaps that you had better institute proceedings to ascertain whether or not I am qualified or disqualified to continue in this case.

(Testimony of William S. Robinson.)

Mr. Margolis: That is not our point at all, your Honor. I don't think that it would be possible for us to have a judge who constitutes a cross-section of the community. [332]

The Court: Or half male and half female.

Mr. Margolis: That is right.

The Court: Well, the Ballard case indicated that that was a requisite for a jury.

Mr. Margolis: That indicates that there is a different test for the composition of a jury and for the method of selecting a jury than there is for the composition, if we can call it that, of a judge or the method of selecting a judge.

The Court: The Jury Commissioner is a public official. The questions directed to him yesterday indicated that some point would be made of a possible bias on his part, as well as the answers from the witness now on the stand that it was impossible for any person to proceed to a disposition of anything without having his actions affected by bias and prejudice.

Now, in view of the fact that those questions were directed to a public official—and I am a public official—I want to know now if some point is to be made, because if it is, it had better be tried now before we go on with this case and incur the expense which is bound to follow, or if a groundwork is being laid for disqualification of the judge in connection with the listing of my name, which I knew nothing about, I will say, in this so-called Blue Book.

(Testimony of William S. Robinson.)

Mr. Margolis: Your Honor, we of course make no such contention. We do not contend that the people in the Blue Book [333] are disqualified as jurors.

The Court: Or lack impartiality?

Mr. Margolis: They, as every other person, lack complete impartiality.

The Court: I do not think that the Constitution goes that far.

Mr. Margolis: I don't know of any person who is impartial in the sense of the word that he doesn't have views and convictions.

The Court: In the sense of the word that it was used in the Constitution, I do not think the people who wrote the Constitution approached it with the same attitude of mind that Dr. Robinson is approaching the question of impartiality. It was used as a common-sense term.

Mr. Margolis: That is right, but I think it is necessary——

The Court: And as to what reasonable men consider impartial.

Mr. Margolis: But it is necessary to distinguish between an impartial juror and an impartial jury. A jury made up of impartial jurors, all of whom are millionaires and each one of whom is impartial and selected exclusively from a list of millionaires, might very well, and would, violate the Constitutional rights of the parties involved in that case, even though each individual millionaire was an impartial juror, and might, as an individual in a jury

(Testimony of William S. Robinson.)

which represented a [334] cross-section of the community, perfectly well qualified as an impartial juror. But in order to obtain an impartial jury, it is necessary to have a cross-section of the community represented, or at least it is necessary to have the jury selected in such a manner that the result ordinarily will be a cross-section of the community.

The Court: The distinction seems to me to be this, the Constitution says that a man is entitled to an impartial jury, and by virtue of the recent decisions of the Supreme Court, they seem to say that a man is entitled to be tried by an impartial jury which is impartially selected.

Mr. Margolis: That is right. But by impartially selected, the courts are not talking in terms of motive; they are talking in terms of methods used to select the jury, as I intend to point out to your Honor when he argue the cases.

For example, a method, a wrong method, can be used with the best of motives.

The Court: And get a complete impartial jury.

Mr. Margolis: And get a jury which is not impartial, and that is to be condemned.

For example, a person, let us take a stranger in town, a jury commissioner who came into town and thought that the Los Angeles Country Club represented a cross-section of the community—that was the information that he had—and believing that that was a good way of getting a cross-section [335] of the community, and expressly disavowing any

(Testimony of William S. Robinson.)

intent to discriminate, no desire to discriminate, but because he actually and in good faith believed that the Los Angeles Country Club represented a cross-section of the jury, used a list of members of the Los Angeles Country Club. His motive wouldn't make any difference because the method was a biased method in the technical, scientific sense, bound to lead to a biased result. I think that when the cases speak of—

The Court: That is to say, the people selected there would not be an impartial jury.

Mr. Margolis: That is right, they would not constitute an impartial jury.

The Court: By the same token, then, your challenge of the people who were listed in the Blue Book are not capable of making an impartial jury?

Mr. Margolis: Not if you make up a jury of 12 from the Blue Book.

The Court: And having one judge whose name happens to be in the Blue Book, do you then have an impartial judge?

Mr. Margolis: I said, your Honor, we make no point on that.

The Court: I am not asking you to answer that; I am asking you the question as to whether or not there is any question in your mind. If there is, there is a procedure by which [336] you can determine my impartiality to try this case.

Mr. Margolis: Your Honor, we are aware of that procedure and if there had been any question in our mind the procedure would have been

(Testimony of William S. Robinson.)

begun before this, your Honor. We would not hesitate to use it if we believed this was the proper place to use it, but because we do not believe it, we are not using it.

The Court: Very well.

Mr. Garrett?

Mr. Garrett: I would like to say this, your Honor, and I would like to refer again—I would like again to have your Honor recall the references that I made to the case of *Smith v. Texas*—Mr. Brown was a witness on the stand yesterday and he was called as a witness on just one point, that is, his testimony had just one avenue of relevancy in this motion, and that was that it was relevant, in so far as it bore upon the manner or method of selection of a jury in which he had a part, a jury list from which petit and grand jurors were selected. That was the purpose of our inquiry.

In the course of his testimony it developed, and it developed as far as I was concerned for the first time, that various lists were used by him in his selection of prospective jurors. I want to make it plain that his functions are clearly not that of a judge. I have never associated his capacities of his duties with those of a judge in any sense of the word. [337] A judge has certain functions, and this witness on the stand has certain very narrow and certain very little defined functions relating solely and exclusively to the machinery of the selection of names from which trial juries and grand juries are drawn.

(Testimony of William S. Robinson.)

Now, when the testimony of this witness revealed that various lists were being used, whether they were phone books or whether they were lists of memberships in clubs, inquiry into the use or the reasons for the use of those lists seemed to me was material as tending to bear upon the question of how the method of selection committed to that witness on the stand, that official, as your Honor uses the word, how that official was pursuing his duties and by what method. And I want to make it very, very clear again——

The Court: I permitted all of your questions because I deemed them material.

Mr. Garrett: That is right.

The Court: Whereupon the questions to which I sustained objections, wherein you made your avowals, that is the thing that provoked the thoughts that are in my mind now. I took it from your avowals that you considered him disqualified because he was listed in the Blue Book and had selected names from the Blue Book, and that he was not impartial.

Mr. Margolis: I wonder if I can comment on that?

Mr. Garrett: May I continue without being interrupted, please, for just a moment? [338]

Mr. Margolis: Excuse me.

Mr. Garrett: It developed that he was using these lists, your Honor——

The Court: I am not accusing anybody of anything.

(Testimony of William S. Robinson.)

Mr. Garrett: No, I understand, but I want to relate the questions which your Honor has commented on to their purpose, if I possibly can.

It was developed that he was using these lists, and the question of what judges or what attorneys might be in any of those lists was, to my mind, utterly immaterial in asking the questions. It happened to turn out that some of us were on some of those lists and some of us have belonged to some of the clubs, or do belong to some of the clubs, or our families from which those lists were taken, and in my mind at least that was a consideration utterly foreign to the questions that were asked of the witness.

The questions asked of the witness were merely for the purpose, not of showing that your Honor or I or Mr. Kenny are disqualified because we are members, or members of our family happen to be on certain of those lists that were used——

The Court: You and Judge Kenny are employed as technicians here. It was a matter of choice of the defendants. It is not a matter of choice of the defendants that I am here.

Mr. Garrett: Those questions, I may say, your Honor, were [339] asked for this purpose, to show merely whether the material used by the witness was narrower than it should have been, and it doesn't matter that the lists, which were largely, or even we might have a situation in which they were exclusively, used, it didn't matter as far as the materiality of the questions to that witness

(Testimony of William S. Robinson.)

was concerned, whether they were lists of country clubs, lists of social registers, lists of labor unions, or bartenders' clambake societies; it was merely an attempt to show, and it didn't matter in the least, whether we or any one of us were associated with those lists or not, it was merely an attempt to show, if I could, by implication to your Honor, that the witness, like everyone given the power of selection or given it, would tend to select from the media that were most familiar to him and to have your Honor draw the inference, if it were felt that that media for that reason or any other reason had been either exclusively used or too largely used, that what had resulted was not the result to which this witness' duties committed him, that is, to draw from a substantial cross-section. That was the purpose of that examination, your Honor.

The Court: May I have an answer to my question? Do you have an intention of avowing my lack of impartiality in the trial of this case by virtue of the fact that my name is in the Blue Book?

Mr. Garrett: I do not. [340]

The Court: Very well.

Mr. Garrett: And knowing me, I hardly see how that question need be raised, if your Honor please. But I merely have spoken as long as I did, not only to show you that my intention was not to raise any such question, but to show you, if I could, that the inference need not be drawn

(Testimony of William S. Robinson.)

that my intention was to raise any such question, because the questions had a useful purpose, if they tended to show reliance on any media, whether that media were one or the other, or whether that list were one or the other.

The Court: I wanted to get the record straight, and that was the reason I was asking the questions.

Mr. Kenny: Your Honor, just in defense of the people I am with, I can conceive of a circumstance where that kind of a jury would be all right. For example, if a jury would be selected for, say, the police court in San Marino, which we know is a community almost composed of blue bookers, that that would be perfectly proper.

The Court: I do not know how or why I got into the blue book. It said in the beginning that it came from old families. I am not an old family; I was a country boy who landed here some time ago.

Mr. Kenny: There is nothing wrong with being a blue booker, and in a community of blue bookers, such as San Marino, it would be perfectly proper to use the blue book. [341] But where you have a community where there are a few people who are not in the blue book, then you shouldn't. That is the point.

The Court: I do not know what the people do who are in the blue book. It says it is a society register of old families and eligible newcomers.

Mr. Margolis: Shall I proceed, your Honor?

The Court: Proceed.

(Testimony of William S. Robinson.)

Direct Examination

(Continued)

By Mr. Margolis:

Q. Dr. Robinson——

A. May I clear up one thing?

Q. Yes, surely.

A. I would like to clear up one misapprehension which I apparently got across yesterday, and that is in the matter of bias.

Statisticians use the word in a technical sense, in this way: If a person picks a sample and it is not like the population, that person is biased. There are no ethical connotations to it. I admit to be extremely biased in picking samples by eye, say, from lists. Everyone is. It is merely the fact that people unconsciously pick certain things.

Q. You mean when you picked people to wash those 60,000 slips?

A. Or any other way. So I am driven, as every other [342] practicing statistician has been driven, to the use of really a random method of picking, that is all. Everyone is biased. Einstein himself, in an article in *Science*, has admitted to extreme bias. When he reads a scale he gets almost exclusively the numbers 0, 4 and 7 for the last digits. He never gets 3's or he never gets 8's, and yet he is a perfectly good scientist. Perhaps that will at least clear up my statement.

Incidentally, I have brought you some random numbers, if you would like to see it.

(Testimony of William S. Robinson.)

Q. You have a random number table here?

A. Yes.

Mr. Margolis: I think it would be interesting to have one in evidence, your Honor.

The Court: Yes.

Mr. Margolis: To illustrate the witness' testimony.

The Court: Yes.

Q. (By Mr. Margolis): I have here a document marked "Random Numbers (III)." Will you explain what this is, Doctor?

A. There are several pages of such numbers. This is the first one.

Q. That is the random number system you referred to in your testimony yesterday?

A. That is a selection from one of the well-known tables of random numbers. [343]

Mr. Margolis: I will offer it in evidence as defendants' exhibit next in order.

The Clerk: V.

(The document referred to was received in evidence and marked Defendants' Exhibit V.)

Q. (By Mr. Margolis): Now, Dr. Robinson, this morning Mr. Janney testified, I believe, substantially as follows: that in selecting the group out of which the panel, the jury panel, was finally selected, he obtained all of the precinct lists in Los Angeles County, then took each fifth precinct sheet during one year, and each ninth name on each of those precinct lists, and from that made

(Testimony of William S. Robinson.)

up a list of persons to be contacted for prospective jury service, and that in other years he might pick the fourth precinct list and the eighth name, or the sixth name. What do you think of that method as a method of obtaining a cross-section of jurors?

A. It seems to me that there are two questions involved in that. One of them, as a statistician, I have nothing to do with, and that is determining, let's say, the total group from which you are to pick prospective jurors. I suppose that would be the group of persons who are eligible for jury service.

The Court: I think that would come under the heading of what is a cross-section of the community.

Mr. Margolis: I think the Doctor is referring to something else. [334]

Q. You are referring to whether it should be Los Angeles County or should be a broader area?

A. No, I am referring to whether you should include in your group people who cannot become jurors if they are picked. That is, whether you want your sample, let's say, to match the total population, including infants, as to percentages or whether you want it to match some specified sub-population, say, the population 21 years of age or over, or with some other properties in addition.

But it is a well-known fact that among available lists for taking samples from population, the list of registered voters is more representative of, let's say, the total working population or the total labor force than is any other available list, such a city directory or telephone book.

(Testimony of William S. Robinson.)

Q. Would you say that such a list, of the voters' register list, is unrepresentative of other groups in the community, such as professionals, businessmen, and so forth?

A. No, it is most representative of the working population as a whole. It matches it quite closely, much better than did the telephone book.

Q. When you say the working population as a whole, what do you mean?

A. I mean the labor force.

The Court: What about a city directory? That includes [345] everybody, whether they want to vote or don't want to vote. Wouldn't that be apt to be more accurate?

The Witness: You might ask the fishermen if they are in the city directory. I don't think it includes everybody. In fact, I know that it doesn't.

The Court: It is pretty hard to keep your name out of it. I know I kept my name out of it with a great deal of difficulty.

Q. (By Mr. Margolis): There are large sections of the community not even contacted with regard to names, isn't that so?

A. It is upper biased economically, as the Literary Digest found out in 1928.

Mr. Margolis: For example, your Honor, I doubt whether you will find many of any names from the eastside in the city directory, outside of businessmen out there.

Mr. Calverley: I suggest that the voting lists are not accurate, for the reason that I think about

(Testimony of William S. Robinson.)

40 per cent of the people in this county do not register at all.

The Witness: Forty per cent of the people who are eligible, it is true, but it is more accurate than any other source.

Q. (By Mr. Margolis): In other words, you don't say that it is a perfect source?

A. It is not, but it is the best that is available.

Q. I see. So that if some source has to be gone to, you would think that the precinct registration lists would be the best source available, is that right?

A. It is very well established that they are the best source available.

Q. How about the method used with regard to selecting the precinct names, or precinct lists and the names on each precinct list?

A. I cannot possibly improve upon it. It is water-tight, provided that in the method of selection it is rotated so as to cover the entire eligible group over a period of years, as I understand it is.

Q. I see. So that if they took the fifth precinct and the ninth name each year over a period of years, you wouldn't consider that fair?

A. No.

Q. But if that precinct list number and the number of the name on the precinct list was varied from year to year, you would consider that the best possible method?

A. Yes. That is known as a method—let me say in brief—that is recommended as possibly the

(Testimony of William S. Robinson.)

finest method of stratified sampling that exists where you can do it.

Q. Now, Dr. Robinson, you have been retained, have you not, by the defendants in this case in connection with a study of the composition of the grand jurors, trial jurors [347] and prospective grand and trial jurors used in the Federal Courts, is that right? A. That is right.

Q. And in connection with that retainer, have you supervised, acted as a consultant with respect to such study? A. I have.

Mr. Margolis: I think perhaps we should have this document marked for identification so it will be easier to conduct the examination.

It has two parts, Mr. Clerk. I would like to have——

The Court: W-1 and W-2.

(The documents referred to were marked Defendants' Exhibits W-1 and W-2 for identification.)

The Court: Have you seen them?

Mr. Calverley: No. Those are the county registrar of voters' records, I believe.

Mr. Margolis: No, they are not.

(Exhibiting documents to counsel.)

Q. (By Mr. Margolis): I show you a type-written document headed "Summary of Occupations of February 1946 Grand Jurors, According to Classifications Utilized in 1940 Census." On the

(Testimony of William S. Robinson.)

left-hand side of the sheet below the heading appears the following, "A, Professional and Semi-Professional Workers," and below that, "1, Actors, 2, Architects, 3, Artists and Art Teachers," followed by additional classifications of occupations.

Then on the second page there is, "B, Farmers and Farm Managers, C, Proprietors, Managers, and Officials," with sub-headings thereto.

Now, will you tell us, Doctor, where that listing of general classifications and specific classifications was obtained, and what it is?

A. That is the 1940 census modification of the Edwards Social Economic Grouping of Gainful Workers in the United States. It is the official occupational classification of the United States Census Bureau.

The Court: Used in 1940?

The Witness: As used in 1940. It is modified every decade when a census is taken.

The Court: Was that the same one that is used by the authors of this book?

The Witness: That is not.

The Court: "Dictionary of Occupational Tables, Department of Labor, United States of America, 1939"?

The Witness: It is not. And I think you will find on the preface a page in that book a statement that the classification is to be used solely for the United States Employment Office.

(Testimony of William S. Robinson.)

The Court: Solely? [349]

The Witness: Solely, if my recollection is correct.

The Court: It says: "These job definitions have been prepared by the United States Employment Service for the use of public employment offices and related vocational services, and for that use alone."

Would you say by virtue of that that this is not dependable for anybody else?

The Witness: No. That serves a different purpose from the Edwards one, that is all. The purpose of that classification has to do with people who want jobs, in placing people in jobs. The purpose of the Edwards classification is to show the position in the social economic scale.

The Court: Would you say that this Dictionary of Occupational Titles and Definitions is inaccurate?

The Witness: No. I have two copies of it myself.

The Court: You have? You are not connected with the United States Employment Service?

The Witness: No.

The Court: So you do depend upon it for use?

The Witness: Quite.

The Court: I see. All right. Go ahead.

Q. (By Mr. Margolis): However, it is a different type of classification than the one used by the census people, is that right?

A. That is right. [350]

(Testimony of William S. Robinson.)

Q. Because of the different purposes of the two?

A. Yes.

Q. Now, on each of these sheets you find four columns, the first column "Employed as," the second column "Housewives whose husbands are employed as," the third column "Retired whose former employment was," and the fourth column "Total."

Would you explain that?

A. Yes. The figures here are from the questionnaires sent to prospective jurors.

Q. And from other sources as well?

A. And from other sources as well.

The Court: What questionnaires?

The Witness: The questionnaires which have been offered in evidence here.

The Court: By the clerk of the United States Court?

The Witness: Yes.

Mr. Calverley: If the Court please, I am going to object at this time to any further testimony from this witness because there are some of these questionnaires that have not been introduced in evidence and are only marked for identification because they are not complete, and I contend, your Honor, that there is a lack of foundation for this witness' testimony from those records because the venire of the petit jury in 1946 and the grand jury in 1946 which returned this indictment is incomplete, and those two exhibits that have been offered here [351] are partial only and are only marked for identification, and the witness has just testified that he used that

(Testimony of William S. Robinson.)

source. Therefore I contend that there is a lack of foundation for his testimony on that basis.

The Court: Well, I do not know whether there is sufficient foundation for his testimony or not. As I indicated at the commencement of this hearing, there is no standard prescribed for determination, there is no method of procedure, and the real effect of the Thiel case and the Ballard case is that it leaves the matter up in the air. This witness is at best offering his opinion, and I suppose that he proposes to make a table from those that have actually served on the grand jury and the trial jury and then, as an extrapolation of figures, and one thing and another, to reach a conclusion which will be his opinion.

Mr. Calverley: There is a further objection, your Honor, that the witness has not testified that he examined all of the names in the available box which the testimony here by two witnesses called by the defendants, and whom they may not impeach, have testified that that was the source of many of these names; and he has not made any examination of that reserve file at all, which is the source of his opinion.

The Court: I do not think he has testified that he has even examined the cards in evidence, as far as that is concerned. I think you can lay a better foundation with relation [352] to that.

Mr. Margolis: I will withdraw the last question, then, and get back to this. I will get at this in another way.

(Testimony of William S. Robinson.)

Q. Dr. Robinson, did you do all of the work yourself in connection with this study, or was the work done under your general direction and supervision as to methods to be followed?

A. It was done under my direction and supervision as to methods.

Q. Were a number of persons utilized in carrying out those directions and instructions?

A. Yes.

The Court: What did you direct them to do?

Mr. Margolis: That is what I want to get to. Suppose you answer his Honor's question.

The Witness: I directed them to classify the subjects, let's say, by occupational levels.

The Court: What do you mean, the subjects?

The Witness: Classify the persons or questionnaires by occupation.

The Court: What questionnaires?

The Witness: The questionnaires.

The Court: Do you have them? They are all marked as exhibits here.

Mr. Margolis: There are exhibits relating to each of these [353] groups of questionnaires.

The Court: Let's pile them up so he can have them available.

Q. (By Mr. Margolis): So that the record will be entirely clear, Doctor, you yourself did not obtain information from the questionnaires; you merely gave instructions as to that point, is that right?

A. That is right.

(Testimony of William S. Robinson.)

The Court: He said he got them from the questionnaires. These are the only questionnaires that are here. I don't know what questionnaires he is talking about.

The Witness: I instructed other persons to get the information from the questionnaires.

The Court: What questionnaires? There are many groups of questionnaires there, Doctor.

The Witness: There are many tables here also.

The Court: What is that?

The Witness: There are many tables here also.

The Court: Many tables?

The Witness: That is right.

The Court: But we are not to the tables yet. We will get to those in a few moments. Now we are talking about the questionnaires. There may be groups of them there. Which questionnaires did you direct your people to examine?

Mr. Margolis: Perhaps I can help the Doctor in his [354] recollection by placing the tables in front of him.

The Court: I think we might have a morning recess.

(Short recess.)

Mr. Margolis: Shall we proceed, your Honor?

The Court: Usual stipulation?

Mr. Margolis: Yes, your Honor.

Mr. Calverley: So stipulated.

Q. (By Mr. Margolis): Either from your own notes, which I see you have there, or from checking

(Testimony of William S. Robinson.)

these documents which have been prepared, will you tell us, Doctor, what questionnaires you directed the people to refer to in connection with this study?

A. Well, here is one in my list, the grand jury February 1947. I instructed them to take all the questionnaires for the members of that grand jury and to tabulate their occupations.

Q. What others?

A. In September 1946 grand jury, the February 1946 grand jurors.

Q. I think, Doctor, for the sake of the record, if I may make a suggestion—I think your notes and these exhibits are the same, but these are in chronological order—would you please refer to them?

A. February 1946 grand jurors. The persons on the grand jury panel February 1946. [355]

The Court: Questionnaires for those?

The Witness: That is right. September 1946 grand jury.

The September 1946 grand jury panel.

The September 1946 petit jury.

All 1946 jurors for whom information is available.

Persons on the grand jury February 1947.

Grand jurors February 1947 excused.

Persons on the petit jury 1947.

Mr. Margolis: February?

The Witness: February 3rd.

Questionnaires for petit jurors summoned to appear February 17, 1947.

Petit jurors 1947 excused.

Persons on the jury not drawn 1947.

(Testimony of William S. Robinson.)

And the overall summary of the jury 1947.

The Court: That would be all the persons in what we have referred to as the master box, would it not, Mr. Margolis?

Mr. Margolis: That is correct. It would be the total of all these other exhibits.

Q. All right, now. Were you informed, Dr. Robinson, that some of these questionnaires did not obtain information concerning occupations and on others the information was not clear?

A. That is correct.

Q. What instructions did you give with regard to obtaining [356] information concerning occupation of jurors or prospective jurors where either the occupation was not given on the questionnaire or where it was not clearly stated on the questionnaire?

A. Substantially, those instructions given to enumerators in the 1940 census. In particular, that where the occupation was not given or was not clear, other sources should be used to get the occupation, and those sources—and this is not the census enumerators' instructions—those were to be the city director, which in social research is established as a reliable source, next the register of voters, and finally, if necessary, if either of those gave the occupation, a personal phone call to the person.

Q. Is that considered a reliable method of obtaining information from a scientific standpoint, the latter?

A. Yes.

Q. Then when information was obtained as to those occupations, did you give any instructions

(Testimony of William S. Robinson.)

with regard to correlation of the information received with the classifications used in the census and, if so, what instructions?

A. I gave the detailed classification list which is provided for the 1940 census.

Q. That was obtained out of the 1940 census, is that right? A. That is correct. [357]

Mr. Margolis: If your Honor is interested in examining this, or counsel is interested in examining this—I don't want to offer this in evidence because it is the only copy I have.

The Court: Let counsel look at it.

Mr. Margolis: I am showing counsel a copy of "Population, Third Series, Labor Force, Occupation, Industry, Employment and Income, California."

If your Honor would be interested in seeing this, the occupation tables are shown here.

(The document referred to was passed to the Court.)

Mr. Margolis: I just happened to turn to one at random, your Honor.

The Court: This is just one occupation table, class of worker and age of employee, persons except on public emergency works, by industry and section for cities of 250,000 or more. This is a very small classification, is it not?

The Witness: A very detailed classification; yes.

The Court: How many different kinds of workers do they have classified?

The Witness: I don't know.

(Testimony of William S. Robinson.)

The Court: Do they classify them by jobs or just by industry?

The Witness: They classify them by jobs and type of jobs, and there may be industrial classifications as well. [358] But that is not the basis.

The Court: This table that he turned to is Los Angeles, total, and so forth, manufacturing. Now, there is bakery products, beverage industry, petroleum products, and so forth. These are only by industries and not by jobs.

The Witness: I think you will find further classification later on. I can show it to you, if you would like to see it, by jobs. That is the basis of the census classifications first and fundamentally, by job and, secondly, a break-down by industries.

Mr. Margolis: I think if you will look at the heading there, you will find that the main heading under manufacturing is operatives, or operatives and kindred workers. In other words, within the type of work there are also break-downs as to industry.

The Court: This says agriculture, forestry and fisheries. Agriculture, forestry except logging, and fisheries. Then it says mining, gold mining, crude petroleum, and so forth. Then it says manufacturing, transport, wholesale and retail trade, finance. This is by type of business, I think. It certainly isn't by type of job.

Mr. Margolis: May I have that for a moment, your Honor? I would like to point something out.

(The document referred to was passed to counsel.)

(Testimony of William S. Robinson.)

Mr. Margolis: This is not the table we used, your Honor. [359] Excuse me. I really did turn to a page at random.

Here is the table that was used.

Your Honor will notice the main break-downs and the subdivisions under those break-downs.

The Court: Professional and semi-professional workers, farmers and farm managers, proprietors, managers and officials, except farm, clerical, sales and kindred workers, and so forth. There seem to be 93 types of occupations.

Mr. Margolis: I haven't counted them.

The Court: They are tabled here. That "93" may be line 93.

Mr. Margolis: There are two pages. It is continued on the opposite page, not turning the page but the opposite page.

The Court: No, this is different.

Mr. Margolis: Then on that one you turn the page.

The Court: I see.

Mr. Margolis: I am sure it is more than 93, your Honor.

The Court: Yes. That is the line number, I see. There are about 181 occupations listed.

Proceed.

Q. (By Mr. Margolis): I want to go back to the question as to your instructions with regard to correlation of the information received concerning occupation with this occupational table or index or method of classification used by the Census Bureau.

(Testimony of William S. Robinson.)

A. By "correlation," do you mean my instructions as to which class to put the different persons in?

Q. That is right.

A. My instructions were to follow the detailed listings that were given here as to individual occupations, to classify them in as detailed a fashion as possible, and they were later then grouped into broad classes.

Q. The same broad classes used by the United States Census Bureau?

A. Yes, and the same detailed classes as used by the United States Census.

The Court: How many detailed classes does the United States Census use?

Mr. Margolis: We can count it, your Honor.

The Court: Does the Doctor know?

The Witness: I think your 181 is right.

The Court: I was looking again at the heading, and it is just for male. That doesn't show over in the female. I don't know whether they change that over here for female or not.

Mr. Margolis: I believe you will find that they are the same except, for example, instead of having actor, you have actress.

The Court: I do not see any female firemen.

The Witness: Provision is made for duplicate entries for [361] male and female, but where no females are shown the class is simply left out, unless it is tabulated in two columns for comparison.

(Testimony of William S. Robinson.)

The Court: The difficulty here, counsel, is that there appear to be different pages cut out.

Mr. Margolis: We were using those pages.

The Court: Pages 94 to 99 are cut out in this book.

Mr. Margolis: Here they are, 87 to 89.

The Court: No, those are not the pages.

Mr. Margolis: There are numerous tables giving the same thing for various cities.

The Court: This is Los Angeles that I am looking at. I am just confining my remarks now to Los Angeles which begins, as to males, on page 90, and as to females on page 94.

The Witness: Los Angeles County or City?

Mr. Margolis: Los Angeles City.

The Court: It just says Los Angeles. I suppose it is city, I don't know.

Mr. Margolis: That is city, your Honor. We used the Los Angeles County figures but we had to borrow that from the Public Library and return it. We do not have that here. But it is available in the Los Angeles Public Library.

The Court: May I see your other pages?

Mr. Margolis: Those that were taken out I notice were used merely for copies of the classifications. We cut out [362] Oakland because we didn't need it.

The Court: Those are pages 55, 56, 57 and 58, and it is pages 95, 96, 97 and 98 that are missing.

Mr. Margolis: I don't know where they are, but so far as the actual population figures are concerned,

(Testimony of William S. Robinson.)

we used Los Angeles County, for which we do not have the book here. We merely wanted to show, your Honor, the form, the type of thing to which we are referring. The Los Angeles County book is set up in the same way, is it not, Doctor?

The Witness: That is right.

The Court: Let's go back to that question. How many occupations, male and female, does the census figure use?

The Witness: I don't know. I never counted them. I would think it would be, to a statistician that question wouldn't occur.

The Court: The reason I am asking the question, Doctor, is because you said you instructed your helpers to break them down according to the census classification in detail.

The Witness: Let me put it this way: Detailed titles, let's say the titles for specific occupations, were used as a guide in placing persons of given occupations in broader categories by which we have them classified here. The list of detailed occupations is, so to speak, an enumerated definition of what is a professional worker or what is an operator, that is all. [363]

The Court: Well, then, how many, would you say, master classifications or broad classifications or key classifications did you have?

The Witness: I can find that from one of the summary tables.

The Court: Is it the same number used here? They use, I think, in this book 14.

(Testimony of William S. Robinson.)

The Witness: The census uses 1, which is professional——

The Court: They have here professional and managerial, and they have three classifications in that, clerical and sales, two classifications in that, service, four, agriculture, three, then skilled, semi-skilled and unskilled.

The Witness: We have 10. They are professional, semi-professional, which is a grouping of two of the census major classifications, farmers and farm managers, that is two, three, proprietors, managers and officials, excluding farm, four, clerical, sales and kindred workers, five, craftsmen, foremen and kindred workers, six, operatives and kindred workers, seven, domestic workers, eight, service workers except domestic, nine, farm laborers—I am sorry—nine is laborers all together, ten, no information.

The Court: What about non-manufacturing, such as railroads, transportation, communication, utilities, wholesale and retail, personal service, other non-manufacturing industries? [364]

The Witness: This is not an industrial classification. This is a function or type of operation performed classification.

Q. (By Mr. Margolis): Suppose you tell us what each of these groups include generally.

A. Well, professional and semi-professional workers I think is fairly plain, but let's get a detailed statement.

(Testimony of William S. Robinson.)

Here we have actors, architects, artists and art teachers, authors, editors and reporters, chemists, assayers, metallurgists, college presidents, professors and instructors, clergymen——

Q. Without going into all of them, is that typical of the kind of person included?

A. That is typical. Lawyers and judges are included there also.

Pharmacists, physicians and surgeons, social and welfare workers.

The Court: Yes, I see them.

The Witness: Farmers and farm managers, I think, is plain on its face.

Proprietors, managers and officials is just what it purports to be.

Q. (By Mr. Margolis): Perhaps the term managers and officials is not entirely clear. What is a proprietor, one who owns his own business?

A. That is right.

Q. Or who has an interest in the business?

A. That is right.

Managers, I think, is plain also—well, a production manager, the manager of a firm or of an office, an office manager, anyone in a managerial or in, let us say, a position of authority, controlling a large number of other employees.

Q. All right. What is meant by officials?

A. Officials are representatives of, let us say, corporations.

The Court: Is that the definition the census uses?

(Testimony of William S. Robinson.)

The Witness: I am giving it to you more or less ad lib, but that is what it means. Conductors, postmasters, they are officials.

The Court: Is that what it means, according to your concept, or is that the prescribed definition or instruction of the Census Department when they are classifying people?

The Witness: That is the instruction of the Census Department, but not in the Census Department's words.

The Court: Do you have the information from the Census Department?

The Witness: The Census Department may give a general statement in the introduction to the volumes. The Census Department's real definition, however, is as I have said before, an enumerative one. It lists occupations which belong [366] under proprietors, managers and officials, and if you want to read the list, I can do that for you.

The Court: No, they are here in this book.

The Witness: Yes, that is right. Railroad conductors, postmasters——

The Court: He wouldn't be a proprietor; he would be an official of some kind.

The Witness: This includes proprietors and officials.

The Court: You mean a conductor is an official of a railroad?

The Witness: Yes, he is an officer representing the railroad.

(Testimony of William S. Robinson.)

Mr. Margolis: In charge of a train, your Honor.

The Witness: That is not my definition; it is the census'.

The Court: Baggage-man, that is a clerical service.

The Witness: Yes.

The Court: All right.

Q. (By Mr. Margolis): Will you go on?

A. The next is clerical, sales and kindred workers, and there you have baggage-men, bookkeepers, messengers, mail-carriers. In the main, by and large, it is clerks, sales people, canvassors and solicitors. The definition again is an enumerative one, but this is a more consistent category.

Q. Would it be correct to say that that were a classification of non-administrative, non-professional, non-executive [367] white-collar workers?

A. That is right.

Then we have craftsmen, foremen and kindred workers, and that is, I think, pretty much self-explanatory.

Q. Give a few examples.

A. Bakers, blacksmiths, boilermakers, machinists, locomotive firemen, welders, painters——

Q. I think that is enough.

How about operatives and kindred workers?

A. Operatives are people who run machines and apprentices, attendants, filling station, parking lot and airport, brakemen and switchmen, chauffeurs, truck drivers, firemen.

The Court: Motormen?

The Witness: I think so.

(Testimony of William S. Robinson.)

The Court: That is what it says here.

The Witness: Dressmakers and seamstresses, welders and flame-cutters.

The Court: Sailors and deckhands.

The Witness: That is right. Essentially, they are people who operate machines or equipment of some sort.

The Court: Where is a fisherman found here?

Mr. Margolis: Before we go on to that——

The Court: Well, all right.

The Witness: At the moment I haven't the slightest idea, but I think we can find out. [368]

Mr. Margolis: I think I told your Honor during the argument on the motion to dismiss that the fishermen were a hybrid creature. You would probably have to look several places for him.

The Witness: As I say, this is a census classification and had you ever read discussions of classificatory problems in the census you would have discovered that their main purpose is not so much a functional classification, that is, by very small classes, as the necessity of getting unambiguous definitions of occupations. The large and broader classes follow a social economic scale, the minor ones don't, and there is a good deal of arbitrariness about it which is necessary for the sake of clarity. I will now look for fishermen.

Fishermen and oystermen are laborers except farm and mine.

The Court: Of which there are 1923 in Los Angeles.

The Witness: Yes.

(Testimony of William S. Robinson.)

Mr. Calverley: In that connection, if I may interrupt a moment, it is the contention of the government here, by this indictment returned by the grand jury under oath, under paragraph 11, that the first defendants here are not employees, workers or laborers who receive a salary or wage for their work or labor, but are independent businessmen engaged in business on their own account and who operate fishing boats on their own account and for their own profit.

Mr. Margolis: I assume we are not bound in advance by a finding that that is so.

Mr. Calverley: There has been no proof here that they are anything other than what has been charged, and the petition is unverified in this motion here.

The Court: The only purpose of this inquiry is to determine whether or not it is a cross-section. I see here that they have real estate agents and brokers, and classified under salary received. Now, I suppose that took everybody whether they owned their own real estate office or whether they did not, I don't know.

Mr. Margolis: There are two types. One group would fall under proprietors, and the other under those employed as real estate brokers and agents. You will find real estate under two headings, your Honor. If your Honor will look under the proprietors, managers and officials, you will find finance, insurance and real estate as a heading; and if your Honor will look under clerical, sales

(Testimony of William S. Robinson.)

and kindred workers, your Honor will find real estate agents and brokers.

The Court: They have finance, insurance and real estate, 3194 in Los Angeles County. They must have missed some when they took that census if they were counting all the real estate men in 1939.

Mr. Margolis: Those are the proprietors, your Honor.

The Court: Yes, and there are 4,000 real estate agents. [370] All right. Go ahead.

Q. (By Mr. Margolis): I think, Doctor, you were starting to tell us about operatives.

A. Yes.

Q. You told us partly. Let me ask you this question about operatives: Are the industrial workers, the workers in the mass industries, like steel, rubber, auto, and so forth, included within operatives?

A. Yes, and they are very heavily represented.

The Court: Counsel, instead of just having the witness testify from all that, in so far as he took the census records, why don't we get some of these books some place or photostat these pages, showing the occupation, area occupation for Los Angeles. There are two pages for male and, I think, two pages for female. All the classifications will be in the record then.

That is what you used, isn't it?

The Witness: Yes.

(Testimony of William S. Robinson.)

Mr. Margolis: We will be glad to have photostatic copies made.

The Court: There are pages missing here. I don't know what they show.

Mr. Margolis: We can get photostatic copies made of the Los Angeles County book, which are the figures we actually used. [371]

The Court: If those are the ones you actually used, I think both male and female should be made up, however.

Mr. Margolis: The classifications are the same in Los Angeles City; the figures as to number and population are different.

The Court: Let's get the pages photostated and put them in here, and that will give them an exhibit number, and they will belong to you, then.

Mr. Margolis: Very well. We will get that. We will have to borrow that from the Los Angeles Library. It is apparently not available anywhere else, so far as we have been able to find out.

The Court: I was looking for it, too, and wasn't able to find it any place.

Q. (By Mr. Margolis): Among the jurors or prospective jurors, there were some who were found to be housewives or retired, is that not true?

A. That is right.

Q. What instructions did you give with regard to them?

A. First, that housewives as a class and retired as a class, were to be tabulated and treated sepa-

(Testimony of William S. Robinson.)

rately, to begin with, so that we should have records for those questionnaires representing employed people for those questionnaires representing housewives separately, and for those representing retired persons separately. [372]

The reason for doing that was—I will put it more easily in another way—the general purpose of this classification is to put into different classes people with different, let us say, economic and social attitudes and backgrounds. It is a well-known fact in sociology, if you like, that one's class in the Edwards Classification is indicative of one's social attitudes.

The Court: What is this Edwards Classification?

The Witness: The occupational classification we used.

The Court: Used by the census?

The Witness: That is right. It was originally invented by a member of the Census Bureau called Edwards, often referred to as the Edwards Classification.

Now, when you come to people who have no occupation or, let's say, can't be placed in this list, such as housewives, some questions might arise so we wanted to treat them separately.

What I instructed should be done, if we wanted to combine housewives with employed, was to classify a housewife as of the occupation of her husband. Now, there is a reason for that. It could be very easily established that there is a high correlation between the social and economic attitudes of hus-

(Testimony of William S. Robinson.)

bands and wives. You find, for example, the very large percentage of families in which husbands and wives vote the same ticket, Republican and Democrat alike, and relatively many fewer households in which husbands and wives vote opposite. There is a general tendency for their attitudes to be the same.

Therefore the best we could do—and it is a perfectly good method, as research goes—if we wanted to have the housewives in, was to classify her according to the occupations of their husbands as giving the best indication of their position in this scale of social economic status or attitudes.

The same thing effectively was done for the retired persons.

The Court: Do you make any effort to ascertain whether or not they had worked in some occupation before they got married?

The Witness: No.

The Court: Well, under the Edwards scale or table, or in sociology, do you take that into consideration in determining what a person's viewpoint might be if there is such a thing as an economic class?

The Witness: For individual people that would not be particularly representative of their attitudes, of a woman's attitude.

The Court: In other words, if a woman had been a school teacher for 25 years and got married, and was married for two years, you don't think that would affect her attitude?

No. 11638

United States
Circuit Court of Appeals
For the Ninth Circuit

LOCAL 36 OF THE INTERNATIONAL FISHERMEN AND
ALLIED WORKERS OF AMERICA, JEFF KIBRE,
GILBERT ZAFRAN, CLIFFORD C. KENNISON, F. R.
SMITH, GEORGE KNOWLTON, OTIS W. SAWYER,
W. B. McCOMAS, HARRY A. McKITTRICK, ARTHUR
D. HILL, C. LLOYD MUNSON, CHARLES McLAUCH-
LAN, ROBERT M. PHELPS, BURT D. LACKYARD,
and RAY J. MORKOWSKI,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record
In Six Volumes
VOLUME VI
Pages 2251 to 2583

Upon Appeal from the District Court of the United States
for the Southern District of California
Central Division

FILED
DEC 11 1947



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LOCAL 36 OF THE INTERNATIONAL FISHERMEN AND
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(Testimony of William S. Robinson.)

The Witness: Yes, but there are not many school teachers who have been school teachers for 25 years who thereupon marry.

The Court: How do you know?

The Witness: I can establish that fact, if you would like me to, from the census.

The Court: The census figures reflect that, do they?

The Witness: No, the Bureau of Census vital statistics will, giving age of marriage.

The Court: Well, suppose that a girl was a waitress and got married, do you think that that would affect her attitude?

The Witness: Well, I think it probably would.

The Court: Let us take a specific illustration. In San Pedro they had a strike some years ago when I was on the Superior Court, or we discovered there that the waitresses belonged to the A. F. of L., and most of them were married to longshoremen who belonged to the C. I. O.

The Witness: But they both belonged to labor unions, didn't they, and they weren't Republicans, very likely.

The Court: I haven't any idea except that there was such a state of violence there that they had to close up the whole San Pedro area. Now, would they be apt to take on their husband's point of view or their own, I mean that class of women?

The Witness: As far as the broad classification and the social attitudes go here, you are [375]

(Testimony of William S. Robinson.)

talking about attitudes in a very specific situation, and I am talking about the attitudes as distinguished, let's say, between laborers and professional men. I think that a woman who marries a professional man will have the same social attitudes that professional men in general have and not the social attitudes that the wife of a fisherman would have or the wife of a man who operates a machine in a factory.

The Court: And that a woman who is married to a man who works by the day would have the same economic attitude and social attitude as her husband who works by the day, is that correct?

The Witness: By and large, yes. I can establish that.

The Court: You can establish that?

The Witness: Yes.

The Court: Well, I think the Supreme Court held otherwise in the Thiel case.

In any event, we will adjourn until 2:00 o'clock.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p. m. of the same date.)

Los Angeles, California, February 20, 1947,

2:00 o'Clock P.M.

The Court: Ex parte matters?

The Clerk: I believe not, your Honor.

The Court: United States v Local 36. Usual stipulation?

Mr. Margolis: Usual stipulation.

Mr. Calverley: Yes, your Honor.

(Testimony of William S. Robinson.)

The Court: Mr. Robinson was on the stand.

While he is resuming the stand, I will state that my remarks that the Supreme Court had made a certain holding, I think it would be more correct to say that it seems to me that it made that holding, or I would like to have counsel argue the point at the appropriate time.

On the matter of the number of precincts, those are matters of which the Court can take judicial notice. I thought for the sake of accuracy that I should have those figures. The total number of precincts in Los Angeles County is 5,894. The total registration on December 27th was 1,277,418, after dropping those who had not voted at the primary or the general election, the previous figure having been 1,861,145, or a total of 583,627 which were dropped for non-voting.

The coming April 1st population estimate, made by the Regional Planning Committee of the [377] County, is 3,747,962. They say that is based on the population census figures as they are taken from time to time, plus building permits which are taken out throughout the whole county for residential purposes. Those figures are in the record for whatever purpose you wish.

I do not know what percentage of the population in this county ordinarily is under 21, that is to say, would be disqualified from voting. Perhaps Dr. Robinson has those figures.

WILLIAM S. ROBINSON

the witness on the stand at the time of recess, resumed the stand and testified further as follows:

The Witness: No, I don't have them.

Mr. Margolis: I think those figures can be obtained at least from the 1940 census figures, because we do have it.

The Court: I suppose the pattern would be the same; it would be a mere extrapolation of that known factor in the 1940 census, a certain percentage of that, which should give the approximate eligible population for this county.

Mr. Margolis: I should think so. Of course, there will be such other questions such as citizenship, and so forth.

The Court: Those are questions of disqualification, but I mean eligibility and exemption, and so forth.

Mr. Margolis: I might also say, while we are on the question of judicial notice, we are of [378] course proceeding on the basis that your Honor will take judicial notice of the census figures and the census records.

The Court: Most assuredly.

Proceed.

Direct Examination

(Continued)

By Mr. Margolis:

Q. Now, Dr. Robinson, I think in the last question, if I recall correctly, you were asked with re-

(Testimony of William S. Robinson.)

spect to the separation of housewives and retired persons from those who were employed, and I don't remember whether you had finished your answer on the reason for the separation and what was done with regard to, first of all, considering them separately and, second, considering them with those who were employed. Do you recall if you had finished your answer?

A. I might summarize it.

The housewives and retired were separated because they are not now employed; that is, they have no occupational classification, so that results are computed separately in what follows for employed members of the panel or the jury as the case may be, and then for the total, that is, with the housewives and retired added in.

I explained that I had directed that housewives be classified in the occupation of their husbands because of the well-known correlation between the attitudes of husbands and wives; and the retired were classified simply by their last occupation before they retired. [379]

However, it makes no difference. The results are about the same whether we deal with either the employed or the total group.

The Court: The employed or the what?

The Witness: Or the total group, consisting of employed, housewives and retired.

Mr. Margolis: Let's see if the record is entirely clear on that.

(Testimony of William S. Robinson.)

Q. You found that the results were the same whether you considered only those members of the panel or of the jury, as the case may be, who were employed, or if you considered all of them together, considering housewives according to the employment of their husbands, and retired persons according to their last employment prior to retirement?

A. That is right.

The Court: What result would be the same?

Mr. Margolis: The statistical results which we are going to introduce as the result of these exhibits. We can't do it all at once.

The Court: I understand. The results we are going to get to pretty soon?

The Witness: That is right.

Q. (By Mr. Margolis): On each of these summaries, the first of which has been marked [380] W-2, there appear four columns. I wonder if you would in each instance tell the Court what it is intended to indicate.

A. The first column is numbered "Employed as."

The Court: Are there copies that I can follow you with?

Mr. Margolis: Yes, your Honor. Here is a complete set.

The Witness: I am beginning now with Set 1, "Summary of Occupations of February 1946 Grand Jurors According to Classification as to 1940 Census."

The Court: All right.

(Testimony of William S. Robinson.)

The Witness: The first column, which is headed "Number Employed as," gives for that group of February 1946 grand jurors the numbers of persons who were employed in the occupations at the left of the table.

On page 2, for example, there was one person employed either as a farmer or a farm manager.

The Court: On page 1 there is one dentist, wife.

The Witness: Yes, but not employed. I am beginning with the first column.

The Court: Housewives whose husbands—you are dealing with the first column now?

The Witness: Yes.

The Court: I see. Farmer or farm manager?

The Witness: That is right.

The Court: You don't know whether he runs a big farm or a little farm? [381]

The Witness: I haven't the slightest idea.

The Court: You don't know whether he does his own work or not?

The Witness: That is right.

The Court: You don't know whether he might work by the day for some other farmer?

The Witness: We know he is not a laborer.

The Court: That is, he is not classified as a laborer under the census table.

The Witness: If he works for another farmer, he would be so classified, as a laborer.

Mr. Margolis: There is a separate census classification for farm labor.

(Testimony of William S. Robinson.)

The Court: I know there is for farm labor, but I think it is a matter of which the Court can take judicial notice, as a matter of common knowledge, that a lot of farmers run their own farms and they work for adjoining farmers as day laborers.

All right. Go ahead. There is one farmer or farm manager.

The Witness: Yes.

Q. (By Mr. Margolis): Let's take that situation, Dr. Robinson. In that situation the farmer would be classified according to his principal occupation?

A. Yes. [382]

Q. Such as owning his own farm and running it, or whether he was a day laborer?

A. According to his principal occupation.

Q. Go ahead.

A. The second column is for housewives whose husbands are employed in the categories given at the left of the table. For example, on page 1 we find one housewife whose husband is a dentist.

Q. All of those references, for the sake of the record, are as to W-2 for identification?

A. Yes.

The third column is for retired persons whose former employment was one of the categories given at the left of the page, and the first one we find is on page——

The Court: Well, continuing on No. 1, you find one dentist, wife, and a physician and surgeon's wife.

(Testimony of William S. Robinson.)

The Witness: That is right. For the retired, the first entry I can find is on page—I can find none through page 5—there are apparently no retired persons in this group.

Q. (By Mr. Margolis): There are, however, on some of the other summaries, is that correct?

A. Yes.

The total column is simply the sum of any figure in the columns to the left of it in the same row. For example, the total of 1 in the first page means there is one person either employed as a dentist or a housewife whose husband is employed as a dentist or a retired dentist. [384]

The Court: I understand. Go ahead.

Q. (By Mr. Margolis): Now, we have marked as W-1 for identification some yellow sheets bearing at the upper left-hand corner, or, rather, the upper right-hand corner, the words “Federal Grand Jury February 1946”—I am sorry I don’t have any extra copies of these—will you explain what these are?

A. These are the original worksheets from which the typewritten sheets were made. They are the same as the typewritten sheets except that the name of the individual is given and the source of the information as to occupation is given, under either Jury Commissioner’s records, city directory, voters’ register or phone information. That is the only difference.

Then finally the class to which that person is applied is given on the right-hand column. It is a worksheet from which the typed sheets were made.

(Testimony of William S. Robinson.)

Q. In other words, it has a number of columns, the first column to the left being the name of the individuals?

A. That is right.

Q. The second column the Jury Commissioner's record, and that is the information from the Jury Commissioner's record? [384]

A. That is right.

Q. In any cases where it is blank, it is intended to indicate that there is no information?

A. That is right.

Q. The third column being the city directory, indicating information from that source?

A. That is right.

Q. The fourth column voters' register, indicating information from that source?

A. Yes.

Q. And the fifth column phone information, indicating information from that source?

A. That is right.

Q. And the sixth and last column is the class applied, being the final result which is transferred onto W-2?

A. That is right.

Q. And to other summaries similar to W-2?

A. That is right. These are the connection between the questionnaires and the summary report.

Q. At the last page of W-2 for identification we find down a little past the center of the page an item called "Grand Totals," followed by "Professional and Semi-Professional Workers," "Farmers

(Testimony of William S. Robinson.)

and Farm Managers," etc. Will you explain, first of all, what that column to the left of those headings indicates? [385]

A. Yes. The grand totals simply refer to the broad occupational classifications which are composed of the individual occupations listed on the previous pages.

For example, they are the captions. On page 1 of W-2 there is the caption "Professional and Semi-Professional Workers," and then there is a detailed statement of what that consists of.

Q. Then on page 2 there is a sub-total, is there not?

A. Yes, the total of professional and semi-professional workers in each of the four columns. Those totals are what appear on the last page under the figures corresponding to the grand total captions.

Q. With the same four columns that are executed throughout?

A. Exactly.

Q. Indicating the same thing?

A. The second column, professional and semi-professional workers, there are two individuals on the second page, and those are re-copied in the second column, first entry, on the supplementary statement.

Q. Then down at the bottom the very last item, as far as figures are concerned, you have a row of figures which appear to be totals for each column, is that correct?

A. That is correct.

(Testimony of William S. Robinson.)

Q. Now, I notice that as to the first and [386] fourth columns on Defendants' Exhibit W-2 for identification, the last page, the portion we are speaking of, there are some figures in ink in brackets, for example, opposite the figure under the column "Employed as," opposite the figure "Professional and Semi-Professional Workers," there is, first of all, in typewriting the figure 0, and then in brackets the figure (1.6).

Then in the second row, "Farmers and Farm Managers," there is 1 in typewriting and then in brackets (.2). Will you explain what those figures mean?

The Court: .2? It is .1 in mine—oh, in the fourth column. Well, it is different because the professional and semi-professional workers as under the total is a typewritten 2, and then in parentheses (2.5).

The Witness: That is correct.

Mr. Margolis: That is the fourth column. I am talking about the first column.

The Court: It says "Professional and Semi-Professional 0 (1.7)." You said 1.6.

The Witness: One of these was re-computed with a slide rule. However, the figures are about the same.

Q. (By Mr. Margolis): Will you explain what these figures in ink are intended to indicate and how they were computed?

A. The figures in ink give the number of persons who would be in that class if the different [387]

(Testimony of William S. Robinson.)

occupational levels were represented as they are represented in the population of the total labor force.

The Court: On the basis of the 1940 census figures?

The Witness: That is right.

Q. (By Mr. Margolis): Which are the last available census figures, is that correct?

A. That is correct.

Q. As to occupation?

A. That is correct.

Q. Let me interpolate here: Do you believe that the 1940 census figures can be used with a scientific degree of accuracy as applied to this situation?

A. Yes. There are undoubtedly changes in the numbers in different occupations, but the proportions of persons in the different occupations will remain relatively constant over a period of years.

The Court: That isn't true as to race, is it? According to some figures released here—I mean the census figures show, I think, 77,000 Negroes in 1940, and there was an estimate of—I don't know, maybe the Haynes Foundation or somebody else showed various figures from 133,000 to 255,000 Negroes.

The Witness: That is number of Negroes, not proportion of Negroes in the total population.

The Court: That is not the proportion, then, to the total population? [388]

The Witness: That is right. The population, if the population doubles you would expect twice as many Negroes even, with a same percentage of the total population.

(Testimony of William S. Robinson.)

Q. (By Mr. Margolis): However, it is possible to have greater increases in certain groups?

A. Oh, yes. But over broad categories of these sorts these increases ordinarily average out pretty well.

Q. Let me ask you this question: If those figures are biased, the 1940 figures are biased, in the scientific sense that you have been using the word "biased," in what way would you believe them to be biased?

A. Well, they would be biased in over-emphasizing and showing to be more important today than they actually are, professional and semi-professional workers and proprietors, managers and officials. They will tend to under-estimate craftsmen and operatives in the main.

Q. Therefore, from the standpoint of the results which you arrived at, and which you will refer to later, would you say that the use of the 1940 census could be misleading?

A. Not possibly. It could mislead only by being too conservative in showing the differences of distribution which appear. The actual differences would be expected to be larger.

Q. Now, going back to this, I wonder if [389] you would tell us how these figures in ink in Column 1 were computed, the mathematical method that was followed?

A. Yes. The procedure was simply this: In the total labor force, to determine the percentage of the total labor force in any given occupational

(Testimony of William S. Robinson.)

group; then on the basis of total number of persons to be distributed, here 15, you compute what that percentage would be of the 15 and write the next to the observed number of persons in that occupational group.

Q. In other words, let us put it this way: If professional workers constituted 10 per cent of the total population in Los Angeles County, then the figures opposite the professionals would be 1.5?

A. Ten per cent of 15.

Q. So the figure 1.6 indicates that professionals and semi-professional workers constitute slightly more than 10 per cent of the total population in Los Angeles County.

A. Yes. To be exact, 11 per cent.

The Court: Counsel, I do not think any of this is material unless you can connect it up with the so-called master box or available box.

Mr. Margolis: Let me ask a few questions which will lay the foundation for the theory which I have.

Q. Assume, Doctor, that you drew simply at random from a list of 25,000— [390]

The Court: Your random or his random? Let us get that straight now.

Q. (By Mr. Margolis): Suppose there was selected without any bias a list from a group of 25,000 or 30,000 cards—let's say 500 cards—those 500 names on those cards were put into a box and the names were mixed up, and then out of that 500, 100 names were selected, and this was done repeatedly over a period of time so that you would say a sam-

(Testimony of William S. Robinson.)

pling of 100 selected from 500 and another sampling of 50 selected from the 500. another sampling of 75 selected from the 500, as a statistical matter are there certain probabilities that the 50, the 75 and the 100 selected from this box, simply blindly selected from the box without any possibility of making any choice as to what the selection shall be, would generally show the same composition as the original 25,000 or 30,000 cards?

A. That is right.

Q. It would? A. Yes.

Q. Is that a scientific matter, Dr. Robinson?

A. Yes.

Q. That can be scientifically stated?

A. That is right.

The Court: Now, Doctor, did you check with the number of persons who were excused by [391] the court here, taking into consideration those who answered the questionnaires and said that they were workers in any of these classifications that are not professional or managerial?

The Witness: Those were checked and we have some later figures on that.

The Court: You have some later figures on those? The Witness: Yes.

The Court: To show what percentage they were and the number of persons who would have been drawn?

The Witness: And how they were distributed, as far as that goes.

The Court: In other words, if the court hadn't

(Testimony of William S. Robinson.)

exercised its discretion in excusing them, can you say how many of these people would have been on this?

The Witness: I can say that the results would have been just about the same.

The Court: About the same?

The Witness: 'Yes, and the order of the probabilities makes it immaterial whether it is about the same or not.

The Court: I am afraid you are going to have to let me from now on, Doctor, decide what is material and what is immaterial in this inquiry.

The Witness: I am sorry.

Q. (By Mr. Margolis): In any event, we will show by other exhibits those factors that have been taken into consideration? [392]

A. That is right.

Q. There are exhibits covering that matter?

A. That is right. I meant really that you can show mathematically that the probabilities will be about the same, just about the same size, if you do take them into account. That is what I meant by saying they were irrelevant.

Q. You were talking about statistically irrelevant?

A. That is right.

Q. Now, directing your attention to the last column on the right, there are a series of figures in typewritten figures, followed by a series of figures in ink in brackets. If I were to ask you the same questions about those figures in ink as I asked with respect to the first column, would your answers be the same?

(Testimony of William S. Robinson.)

A. That is right, except for the 23 instead of the 15 for the totals.

Q. In other words, your percentage of the population, if your percentage of the population was 10 percent, then the result would be 2.3 instead of 1.5?

A. That is right.

Q. Because the total is 23 instead of 15?

A. That is right.

Q. There are other exhibits which have been prepared with similar sets of figures? [393]

A. Yes.

Q. Was the same method used with regard to all of them? A. Yes.

The Court: Well, now, Doctor, scientifically your conclusion and opinion is that to have this balanced, a cross-section of the community, assuming that legally a cross-section of the community would encompass only those classifications of occupations that are used in the census figure and which you have used here, you would have had 2.5, that is, 2½ professional and semi-professional workers?

The Witness: That is correct.

The Court: And you would have had .2, or 2/10ths, of a farmer?

The Witness: That is right.

The Court: And 2.7 of a proprietor, manager and official?

The Witness: That is correct.

The Court: Now, down here you have "no information, .1," which is 1/10th of a person, is that right? The Witness: That is right.

(Testimony of William S. Robinson.)

The Court: Now, how would you come to reconcile that so that you could get 23 people out of it, scientifically and still keep it balanced?

Mr. Margolis: That is my next question, your Honor. I anticipated it. [394]

The Witness: I might point out that there is a distinction between, let us say, a conversation and numbers of cases. You cannot find a family, for example, in which there are 3.3 children, but the fact that in a given state——

The Court: You might take into consideration that as a legal proposition a child is in existence when it is conceived.

The Witness: All right. You might. But there is still a meaning to the fact that the average size of the family, let's say, in a given state is 3.3 persons. These numbers are not supposed to describe individuals. The observed numbers naturally are digits. They are the results that count, because they are based upon observations.

The numbers which are written in ink involve fractions, simply because they are based upon a percentage.

The Court: I understand that, and I understand it quite well, but what I am trying to get at is, courts and clerks and people who administer the law are charged with getting an impartial jury from a cross-section of the community. You say to have a complete cross-section you have to have 2.5 of this, .2 of this, and so forth, but you can only have 23 people.

(Testimony of William S. Robinson.)

Mr. Margolis: If your Honor please, I intend to cover that by my next question, and I want to say that it is not our contention that this would be a representative cross-section jury. This is a method of arriving at one.

The Court: I quite understand that. [395]

Mr. Margolis: This is a method to arrive at to what extent, if at all, this jury departs from a representative cross-section jury, and if your Honor would permit me to ask a few more questions, it will lead up precisely to the answer your Honor wants. We have that in mind.

The Court: Unless this witness can offer something. All his testimony so far is a mere scientific jargon which contributes nothing whatever to the solution of the problem which we are trying to get at here.

Mr. Margolis: Your Honor, I think that the term "scientific jargon" is very unfair in view of the——

The Court: I say unless——

Mr. Margolis: If you will give us an opportunity to develop this.

The Court: Unless it is. When I refer to "jargon," I do not mean to be disrespectful any more than I do when I refer to "legal jargon." In other words, legal jargon has nothing to do with horses running, and it could be referred to that in connection with horse racing.

Mr. Margolis: If your Honor please, we intend to develop the scientific basis for this. My sugges-

(Testimony of William S. Robinson.)

tion, very respectfully, was that we have an opportunity to ask a few more questions.

The Court: If you expect to come to that point and relate it, you go ahead and we will defer this question. [396]

Q. (By Mr. Margolis): Is it possible, scientifically, having a knowledge as to the composition of the population and having knowledge as to the number of persons to be drawn from that population, to determine the reasonable variation as to the types of persons that would be obtained if the persons were obtained at random and without bias from a cross-section of the population?

The Court: Will you read that question?

(The question referred to was read by the reporter, as set forth above.)

The Witness: It is.

Mr. Margolis: Is that question clear?

The Court: No, it isn't clear.

Mr. Margolis: All right.

Q. Perhaps you can explain in your own language just what it is that can be determined, Doctor.

A. I can try.

Let's take a given class of people, say professional and semi-professional people. If there are 10 per cent of those in the population and if you draw a sample, let's say a certain number of cases from that population, at random without bias, there will not be exactly ordinarily 10 per cent of professional and semi-professional workers in that sam-

(Testimony of William S. Robinson.)

ple. In other words, in the total population there is exactly 10 per cent, but in a sample there may be 9 per cent, or there may be 9.5 per cent, or [397] 10.5 per cent. And if you take repeated samples from the same population those percentages of professional workers will vary somewhat one from the other.

Q. Even though they are selected purely in the best scientific way, is that right? A. Yes.

Q. Go ahead.

A. It is possible, if you select at random and know that you select them randomly, to estimate the range within which that percentage in the sample will vary from sample to sample to sample. That was what I meant when I answered the question "yes."

It is possible, if you know percentages of the different occupational groups in the total population, to know the size of the sample that is being taken, to set limits within which the variation for any one of those percentages will lie for samples.

You might make a statement of this sort, for example, that if the percentage of professional and semi-professional workers in the population is 10, that in samples of 100 individuals from that population—and this is only an example and not the exact figure—the percentage in the sample will lie between, let's say, 9.2 per cent and 10.8 per cent.

The Court: Or maybe more.

The Witness: No, those are limits that I am giving you. They can be computed definitely. [398]

(Testimony of William S. Robinson.)

The Court: Is that from your experience?

The Witness: No, from mathematics.

The Court: From mathematics?

The Witness: That is right.

The Court: And not your experience?

The Witness: That is right.

The Court: They wouldn't vary above or below that?

The Witness: You can set your limits as you like so that a certain proportion of your samples will vary above or below, but you can set the proportion.

The statement you make is of this sort: 95 per cent of all such samples from this population will have percentages of professional workers falling between 9.2 and 10.8 per cent. And then if you set up a population of that sort and carry out an experiment you will find that percentage verified.

The Court: That is, it doesn't vary in different sections of the country?

The Witness: No, it does not.

The Court: Is it the same in Georgia as it is in California?

The Witness: Quite so, and whether it is performed by a Negro, Jew or a white man, or any time of the year or in any season or in any condition of the weather. As long as a sample is taken with random sampling numbers. [399]

Q. (By Mr. Margolis): Now, Doctor, is it also possible to tell, once you have the figures that we are talking about, what the possibility of any given

(Testimony of William S. Robinson.)

result is if a random sampling method or an unbiased method is used? A. It is.

Q. And is it possible for you to describe simply the mathematical process through which that result is obtained?

A. The arithmetic process is easy to describe. That is computing. The mathematical process, the respective samples as mathematics goes is not easy to describe, but I think I can give you a rough idea of the sort of reasoning involved by using another kind, by using an analogy, or a simple illustration.

Let's say you have a large drum of some sort and you have it filled with black and white marbles, and that you put in, let's say, a vary large number of marbles, and that 10 per cent of them are white and 90 per cent of them are black, so you have a large drum or population, let's say, consisting of 100,000 or 200,000 or 300,000 marbles, of which 10 per cent are white.

You stir that drum very thoroughly with a paddle or shovel, or something else, you stir it very thoroughly, then you pick out, let's say, a sample of 50 marbles without regard to their color. You lead a blind-folded person up and have him pick one after the other. You can then observe the [400] proportion or percentage of white balls in your percentage of 50 cases. It will not be exactly 10 per cent, maybe 12 per cent, it can't be 11, it can be 12 or 14 or 16 per cent, or it can be 8 or 6 or 4 or 10 per cent. If you take repeated samples of that sort, throwing them back before you take an-

(Testimony of William S. Robinson.)

other so you keep the composition of the drum 10 per cent, those sample percentages will vary one from the other.

The Court: Those marbles would all have to be the same size?

The Witness: As physically similar as possible.

The Court: But people are not, though.

The Witness: No, but random numbers are.

The Court: Random numbers are?

The Witness: That is right. And the reason you use random numbers is that you associate people with numbers so that you can't be bias in selecting.

All right. Now, from an empirical standpoint, without any mathematics or theory of probability, let's assume you had taken samples of 50 one hundred thousand times. You wouldn't have observed—and these are not exact numbers—that all of those 100,000 samples, that the proportion of white balls in them would range from 2 per cent to, let's say, 18 per cent. In taking samples of 50 from a population in which there are 10 per cent white balls you never in 100,000 samples get a percentage [401] of white balls less than 2 per cent, you never in 100,000 samples get a percentage of white balls greater than 18 per cent.

Now, suppose someone leads you up to a drum which composition is unknown—

The Court: Wait a moment. That gives a variation from 2 per cent to 18 per cent.

The Witness: That is right.

(Testimony of William S. Robinson.)

The Court: That is different, then, than your 8.2 per cent.

The Witness: Those numbers are illustrative. I haven't computed them at all. I am saying you can set numbers like that and what their exact values are we don't need to worry about.

Let's suppose you have this fact stored in your memory. It is based upon an experiment, to be sure. I have it in my memory, but it is based on mathematic derivation, but they are both knowledge, let's say.

Now, someone leads you to a new drum and you don't know its composition, you don't know what percentage of the balls is white and what percentage are black, but some are white and some are black. He allows you to stir the drum very thoroughly and then he allows you blind-folded to pick out marbles from that drum. You pick out 50 per cent and you find that 72 per cent of the marbles are white. Would you believe that you had a sample of marbles from the first drum in which there are 10 per cent white? [402]

The Court: I am not answering questions.

The Witness: Well, you have observed that when you pick marbles from a drum where 10 per cent of them are white, the limiting percentages which you get for white marbles in samples of 50 are between 2 and 18. If then you go up to a drum of unknown composition—well, let me add another step.

(Testimony of William S. Robinson.)

If you then performed a similar experiment from drum with 20 per cent white marbles, you would find, let us say, that the percentage of white marbles in samples of 50 lay between 12 and 28, and if you perform it from a drum in which there were 30 per cent white marbles, you would find the percentage laying always 8 down and 8 up, between 22 and 38.

In other words, you found that whenever you picked a sample of 50 cases from a large drum in which there was a given percentage of marbles that were white, the percentage of white marbles in the sample always lay within plus or minus 8 of the percentage of white marbles in the drum.

Now, what is your inference if you get from an unknown drum 72 per cent white marbles in a sample of 50? It is simply that in that drum, what? Well, the percentage of white marbles is somewhere around 72, and it is not very likely more than 8 units from 72 in either direction, at least it is not 8 or 7 or 5 or 4 per cent.

Well, that is a very simple example of the [403] kind of reasoning that underlies the mathematics by which the probability of getting samples with so many persons of different occupational levels was computed on the assumption that these were samples from a cross-section of the total labor force.

The Court: Before you would undertake, however, in that one experiment where you would use 72 white marbles, you wouldn't want to say that that was 72 per cent unless you had previously con-

(Testimony of William S. Robinson.)

ducted the experiments with the 10 per cent and 20 per cent so that you had some information or knowledge how they would run?

The Witness: That is right.

I might add that the way formulas of this sort are devised is that they are devised mathematically. It is pure mathematics. Before they are ever used by any statistician they are tested empirically by what is called experimental samples so they are verified experimentally, say with 100,000 or 1 million samples, before they are ever applied to observations.

Q. (By Mr. Margolis): Would it make any difference whether they are marbles or squares?

A. Or human beings or automobiles.

Q. Or anything else? A. None whatever.

The Court: The percentages have to be the same? [404]

The Witness: Yes. That is the only relevant matter.

The Court: They would have to be the same size and weight, and so forth, so that the heavier marbles wouldn't be at the bottom?

The Witness: If you picked them by hand, but ordinarily we pick them by random numbers, so even physical differences between the observations make no difference.

The Court: Was the random number method the method used in the draft numbers?

The Witness: No, and the draft numbers were not randomly ordered. I am not sure whether that

(Testimony of William S. Robinson.)

has been a matter of court decisions or not, but it has been decided by a number of very prominent mathematicians in a number of universities in the United States. It was impossible apparently to stir the contents of the fish bowl sufficiently to distribute the names at random.

The Court: There were numbers in the fish bowl.

The Witness: There were numbers in capsules.

The Court: Yes. The point is, if you were going to do that by random you would use random numbers in there, is that it?

The Witness: No, I would know it or—let's say—if you want to know, if you look at your table of random numbers I can show you.

The Court: Well, I was going to get around sooner or later to asking just how you would [405] go about picking 23 people out of more than 3 million and have them divided between a fair cross-section of this community so that they would be representative approximately in these numbers that you have put in column 4 on your Exhibit W-2.

The Witness: I will wait until you ask me that question.

The Court: Are you at that point in your examination?

Mr. Margolis: I have no objection to that question being answered at this time. It is a little out of order, I think.

The Court: Go ahead. I am getting everything out of order here, I guess, in the presentation of this matter.

(Testimony of William S. Robinson.)

The Witness: It will require considerably more explanation, and I think it will be necessary a little later on.

The Court: All right.

Q. (By Mr. Margolis): Now, have you taken the figures on W-2 in the first column on the last page and computed the probability of that kind of a selection being made without bias from a cross-section of the population of Los Angeles County?

A. I have.

Q. What was your result?

A. Well, if you were to draw 1 million such samples without bias, two of them would be as out of line as this sample is.

Q. In other words, it would happen once in 500,000 times?

A. That is right [406]

The Court: That might be the first time, too, might it not?

The Witness: It might.

Q. (By Mr. Margolis): But the odds would be 500,000 to 1 against it being the first time?

A. That is correct.

The Court: How could it come 500,000 to 1?

The Witness: You would have to assume that that would be the last time, if the odds are 500,000 to 1. Excuse me.

Mr. Margolis: Do you want to answer that question?

The Witness: Yes, I should like to answer that question.

The odds are 500,000 to 1 because of all the trials which might come up there are only two out of a

(Testimony of William S. Robinson.)

million which would be as bad as this. That is, odds refer to repeatedly doing something. Even if something happens the first time, you do it. The odds in doing it may be very slight. That is, some horse wins the Kentucky Derby every year. The chance that any given horse before the race will win it is very small. In fact, as I remember the estimated computations on that—some mathematicians like to play with figures of that sort—as I remember, the largest chance that any single horse would win the Kentucky Derby would be something like 2 out of 10 chances, and yet some horse always does win it.

The odds really refer only to repeatedly doing something and have meaning only in terms of doing it over and over again.

The Court: But it still might happen the first time.

The Witness: It still might happen the first time.

Q. (By Mr. Margolis): Now, there are certain odds on this first particular situation, there are certain odds against obtaining a royal flush, isn't that right? A. That is right.

Q. Now, if somebody obtained that once, that is certainly within the realm of probability and it has happened lots of times?

A. That is right.

Q. Suppose somebody got a royal flush twice in a row?

A. That happens much less frequently.

Q. What would be the difference between the two?

(Testimony of William S. Robinson.)

A. Well, the chance would be just the square of the possibility the first time.

Q. And by the time that you get four or five royal flushes in a row, you might begin to suspect that something was wrong, is that right?

A. That is right.

The Court: Well, in an impartial grand jury selected from a cross-section of the community, it should, in that instance, I should think, include gamblers who are used to playing cards. [408]

The Witness: I might add that the chances here are immeasurably smaller than the chances of getting a royal flush.

Q. (By Mr. Margolis): In other words, the chance to get a royal flush more than once in 500,000 times? A. Yes.

Q. Now, turn to the column on the right-hand side of the last page of Exhibit W-2 for identification. Have you computed the probabilities there?

A. I have.

Q. What result did you get?

A. The probability was so small that to compute its exact value required a lengthy computing which I performed on other figures, of comparable figures to go with it. I can merely say that it is less than one chance in 1 million, and roughly one chance in 100 million.

Q. Now, I notice immediately below that right-hand column——

The Court: You mean to say that out of 100 million times there would only be once that the

(Testimony of William S. Robinson.)

grand jury of 23 people in a county this size would be composed of the composition that you have indicated on the last page in the total here, column 4?

The Witness: That is correct [409]

The Court: Once in 100 million times?

The Witness: That is right. But I should like to point out that it is not correct to take both of these columns as together constituting independent bits of information.

The Court: Did you take into consideration there the total population?

The Witness: Yes. What I am trying to explain to you, though, is the fact that the probability is very small in column 1 which makes it small in column 4, so that these are not two independent things. You see what I mean? That is, most of the people who are in column 4 are also in column 1.

The Court: I understand.

The Witness: Therefore the whole page should be considered as just one case. The two instances here are depending on whether you want to consider only the employed members of that jury or all members of it. That is all. The conclusion is the same in the two cases.

Mr. Margolis: I would like to call your Honor's attention to the fact that that total result shows two professional and semi-professional, two farmers and farm managers, fourteen proprietors, managers and officials, five clerical, sales and kindred workers, no craftsmen, no operatives and kindred workers, no domestic service workers, no protective

(Testimony of William S. Robinson.)

service workers, no service workers except domestic and protective workers, no laborers, and no one no information. [410]

The Court: You checked them to see if any of those were excused, did you, or you don't have the questionnaires on those, so you can't tell?

Mr. Margolis: Our other exhibits will show all of these things. Before we are finished, we will have the excused and every type of sample.

The Court: I thought the testimony was that the questionnaires are not available for the 1946 grand jury.

Mr. Margolis: We had the cards for the balance of the panel and we have an exhibit on it.

The Court: Very well. And you did get the information as to what their occupation was?

The Witness: That is right, except for those cases listed as unknown.

Q. (By Mr. Margolis): Now, I notice down in the lower right-hand corner of this Exhibit W-2 for identification there are a number of figures. Are those part of your computation?

A. Those are the results, let's say, of my computation.

Q. Will you explain what they are?

A. Yes. The P is the probability of getting such a bad result as is observed here, and the statement there, if you can read my handwriting, is that that is less than .000001, which is one in a million.

The Court: That isn't here. You have X2 equals .39, 10 equals 3, P equals .5144. [411]

(Testimony of William S. Robinson.)

The Witness: That says the same thing.

The Court: I see.

The Witness: We will come to it in a moment. The X^2 is actually χ , the Greek letter Chi, squared. It is a statistical measure of a discrepancy between a sample distribution into any kind of classes and the corresponding distribution for a population.

We will say it is a statistics invented by Carl Pearson in 1898, a thoroughly accredited statistician, and given in all statistical tests for the specific purpose of testing coincidence and agreement or lack of agreement between a sample distribution into classes and population distribution.

The lower case "n" is perimeter which deals with that distribution. I just can't explain it, but it is something in which you have to enter a table. It depends on the computation.

The "P" that you have on your sheet means it is equal to .0, and then there is a superscript 5. That means that that is a shorthand way of writing five O's after a decimal point. It means that there are as many O's as there are numbers in that superscript. It means .000001. χ square equals 30. Well, χ square actually, as you can see from the above, is 39, which is a larger value, and that makes the probability less than the figure given for 30. It is my rough guess that it is roughly 1 in 100 million, but we have exact figures for those probabilities in later exhibits. [412]

Mr. Margolis: At this time, your Honor, I offer Exhibits W-1 and W-2, which are the worksheets

(Testimony of William S. Robinson.)

as described and the summary of occupations of February 1946 grand jurors according to classifications utilizing the 1940 census, into evidence.

Mr. Calverley: We object to that on the ground of lack of foundation. The witness has testified that he has not examined all of the 24,000 or 25,000 names which was the basis of this selection. We do not have here the questionnaires of the February 1946 grand jury except those who were actually selected.

A further objection is that this witness' testimony is based on hearsay. He did not do this personally, he directed it, and it is based on telephone conversations, a great deal of it, that his subordinates had with not only possibly even the prospective juror himself but whoever answered the telephone at the other end of the line.

The Court: On the matter of hearsay, I do not think that that is a sufficient ground to sustain your objection, because most expert testimony is based upon hearsay and is only opinion. It is actually hearsay itself. I do not know whether there is sufficient foundation laid to admit it or not.

However, it will be marked for identification and a ruling on it will be reserved. I am inclined to think that it is [413] not admissible on the ground that there is not sufficient foundation laid.

Mr. Margolis: Your Honor please, I would appreciate—I have this problem, which your Honor must appreciate, as a matter of proving a case—if your Honor rules now and I have an indication as

(Testimony of William S. Robinson.)

to the basis of the ruling, maybe I can supply the foundation that is lacking. On the other hand, if we wait until the conclusion and I simply rest on the assumption that perhaps your Honor will admit it, then I will be foreclosed from the opportunity to furnishing any additional foundation. I think I can furnish all the additional foundation, your Honor, which is necessary—I think no more is necessary at this time, however.

The Court: Counsel, I base my ruling on the proposition that this man has not examined the 25,000 names. It is not shown that he has ever examined any previous grand jury panel drawn in this manner—he says this is 1 in 100 million with this group of persons in a cross-section—I do not think there is sufficient foundation laid. It is an exceedingly interesting situation, but I do not think there is sufficient foundation for it.

Mr. Margolis: May I be heard on that point?

The Court: It may be that it would be material before a congressional committee—I don't think there is any doubt of that—who are considering a means to secure some uniform [414] method of selecting a jury, but in connection with this motion to dismiss this indictment on the ground that the law has not been complied with, I don't know. I have been exceedingly liberal, I think, in the matter of the whole hearing. We have conducted it more or less as an inquiry before the Court rather than restricting you to what has been indicated to be a strict matter of proof.

(Testimony of William S. Robinson.)

Mr. Margolis: May I be heard before your Honor makes up his mind?

The Court: I am not going to rule against you now, but I am not prepared to rule for you. It may be that further examination of this witness and further exhibits will develop the lack of foundation which is lacking.

I have been studying the situation in my mind. I don't know whether any of this witness' testimony is material, and at the conclusion of the hearing I may strike it all on the ground that there is not sufficient foundation. But presently I will let it in, his testimony, but withhold ruling on this.

Mr. Margolis: I would like, if your Honor would permit me, to have something to say about it because I think it would, to some extent, condition your Honor's approach to this testimony.

First of all, as far as this particular exhibit is concerned, we already have in evidence the 23 questionnaires for the February 1946 grand jury, and certainly the composition of [415] that grand jury, that is, the grand jury that returned the indictment, is material to the inquiry here, and the basis upon which it was obtained. As your Honor indicated in his statement, the manner in which the information was obtained, while being in the nature of hearsay, is the way that scientific investigations, the way that studies are made, and the type of hearsay that is admissible.

The Court: Opinion testimony is hearsay. It is one of the exceptions to the hearsay rule.

(Testimony of William S. Robinson.)

Mr. Margolis: That is right. So at least this part, to begin with, of the exhibit which shows the occupations of the 23 jurors whose cards are already in evidence, at least that part, it seems to me, is, even under your Honor's view at the present time, admissible.

Now, as to the second part, as to the question of the reliability of the estimate, we have this witness' testimony, who I believe your Honor will concede has qualified as an expert in this field, he is considered as an expert on a national basis, that if you took these at random, as has been testified, from 25,000 or 30,000 cards, and made other random selections and added to that, that you would get the same overall result as you would if you had made the original choices from a cross-section.

In other words, that a choice from a cross-section of a small segment, let's say a choice of 23 from a segment of [416] 30,000, which itself constitutes a cross-section, will give you the same result as the choice of 23 from the original group. And there is no reason why it shouldn't give the same result, and it seems to me it is logical that if you take, say 3 million and choose 30,000 which will constitute a cross-section, and choose 23 from the 30,000, you will achieve the same results mathematically and statistically as if you had originally taken the 23 from the 3 million.

In any event, whether that is correct or not, that is the testimony here.

(Testimony of William S. Robinson.)

The Court: Not according to this witness' testimony.

The Witness: That is demonstrable mathematically.

Mr. Margolis: This witness has so testified.

The Court: I didn't so understand his testimony.

Mr. Margolis: That is what I wanted to find out.

The Court: And, moreover, as I understand this witness' testimony, he says that the only way you can have a random selection is by the random number system.

The Witness: That is not the only way, but it is the best way.

The Court: That is the best way.

The Witness: That is the easiest way.

Mr. Margolis: Your Honor, the witness has testified that the method used by the Jury Commissioner of the Superior Court was the scientific random method. That was the first thing [417] that he testified to when he was put on the stand this morning, that if you took every fifth precinct list and took every ninth name one year, and the next year every fourth list and every eighth name, that that was the sort of method that he was talking about.

The Court: Is that a random number method?

The Witness: Yes.

The Court: Well, then, what are all these tables of random numbers?

The Witness: You are pushing me into giving a lecture.

The Court: No, I am not.

(Testimony of William S. Robinson.)

The Witness: The purpose of randomness is to give you representativeness.

The Court: All right.

The Court: The purpose of randomness is to eliminate bias.

The Witness: Lack of bias is representativeness.

The Court: All right.

The Witness: There are a number of ways of doing it. If you want to take ultimately the whole population, as they do for the Superior Court, that doesn't use any randomness, but, nevertheless, is representative.

There are other ways of getting randomness. The point seems to me to be—the only point that I have seen here at least—is whether or not this is a representative sample of the population. That is all I have been telling you. And it is not. [418]

Q. (By Mr. Margolis): Are there variations as between—is there only one representative sample of 23 persons who could be selected to form a grand jury and yet be said to be a representative cross-section?

A. No, there are a very large number of them.

Q. Is there one of them? A. No.

Q. Is it anywhere near one of them?

A. No.

The Court: It is 1 in 100 million, isn't it?

The Witness: That is right. It is two of the worst in a million, let's say. It is one of the two worst that happens once in a million.

The Court: I thought you said 100 million.

The Witness: I am sorry. On the 23, my estimate was 100 million.

(Testimony of William S. Robinson.)

The Court: On the men it was 1 in a million. They weren't quite as bad unless they were polluted by the eight women, and then it is 1 in 100 million?

Mr. Margolis: Your Honor, so that the exhibit may be clear, the first column includes women, it includes employed women.

The Court: I thought it didn't.

The Witness: It is the number of persons male and female [419] employed as, and the other is housewives.

The Court: It doesn't say "number of persons male and female employed as."

Mr. Margolis: It says "Number of persons," and I think "Number of persons" includes male and female.

The Court: It says "Number employed as." Anyhow, that is straightened out. It includes men and women?

The Witness: That is right. I misspoke in the 2 out of a million, but let's say the only exact statement I have about the 23 is that the probability is less than 1 in a million. So let's leave it at that.

The Court: You testified it was 1 in a hundred million.

The Witness: I said that would be a rough guess as to what the actual figure was. I explained that to find the exact figure I would have to get an involved computation so I could only guess at it. That is as far as the tables go.

The Court: There is another thing I have in mind in connection with whether or not this is ad-

(Testimony of William S. Robinson.)

missible. Congress has provided by statute for a jury commissioner, and they have allowed him \$5 a quarter, or whatever it is—what is it, \$5?

Mr. Smith: Not over \$15 a term.

The Court: Not over \$15 a term. There are two terms in a year, so that would be not over \$30 a year. Congress makes the appropriations for the clerk's salaries and allows [420] the personnel. Now, it might be desirable to go to the voters' register—I don't know; I will say for the benefit of counsel here that from time to time since I have been on this bench I have endeavored to find a means other than the present one used for the selection of juries, and have gathered some information concerning the segregation and methods and costs—but the point I am making is that I have to admit this evidence, not only in the light of what you are trying to get at here, but also in the light of what Congress has allowed by way of personnel to perform these services.

Mr. Margolis: I would venture to disagree with that, your Honor. I would say that if Congress hadn't allowed a cent for the selection of a jury, so that there was no way of paying for anything—let's assume that the court said, "I will have to deny a jury trial because I have no means of getting a jury. I am not allowed any means of getting a jury and therefore I deny you a jury trial."

The Court: I could appoint somebody marshal and have him go down on the street and get a jury then.

(Testimony of William S. Robinson.)

Mr. Margolis: Let's assume that you have nobody to appoint as marshal and nobody would work without money. Let's assume that sort of a situation. If that hapuened, I venture to say that the denial of a jury trial would nevertheless be reversed.

Similarly, the Constitutional right to a representative [421] jury, to a jury which is selected through a system designed to secure a cross-section of the community, is a constitutional right, and the difficulties which stand in the way of getting one, under many authorities in the Supreme Court, must yield to the constitutional right.

The Court: I do not think there is any doubt about that, counsel, but I have to take into consideration the fact that this statute has been on the statute books for many years, that for a great many years juries have been selected and Congress has had a problem before it, and certainly the latitude here in the matter of the clerk going out, or the commissioner going out, and canvassing 3 million names, if that were necessary, to get a complete cross-section, or 33,000, or the 5,498 precincts in the county, is a matter that I have to take into consideration in limiting the scope of this inquiry.

Mr. Margolis: Your Honor please, on the question of what has been done, I think that there were many, many years in the Federal Courts when there were no women on the jury, yet when the question was presented as to whether or not there should be women on the jury, you know what the Supreme Court said in the Ballard case.

(Testimony of William S. Robinson.)

For many, many years there were juries without Negroes on them, where Negroes were simply kept off the juries until a series of cases ending up with *Smith v. Texas* established that. [422]

For many, many years the right of occupations of different economic sections of the community to be represented on the jury was not recognized, I concede that, but we now have the Thiel case.

The Court: No, I cannot agree with your last statement, that different economic classes, if there is such a thing, were refused representation on the juries.

In any event, I am not prepared to rule on it at this time, and it may be that you can develop a sufficient foundation later. I have indicated to you something of what is in my mind.

Mr. Margolis: May we have a short recess?

The Court: I think it is necessary.

(Short recess.)

The Court: Usual stipulation?

Mr. Margolis: Yes, your Honor.

Mr. Calverley: Yes, your Honor.

Mr. Garrett: If your Honor please, may I be excused at 4:00 o'clock to go to another court?

The Court: Surely. I am sorry I delayed you, but I had some business with another judge concerning another matter.

Proceed.

Mr. Margolis: Your Honor please, I have here some yellow sheets marked "Grand Jury Excused

(Testimony of William S. Robinson.)

1946," and a white sheet headed "Summaries of Persons on Grand Jury Panel February [423] 1946," which I will ask to be marked as the defendants' exhibit next in order.

The Court: That one is summaries of persons on grand jury panel February 1946?

Mr. Margolis: That is correct. I will ask that those be marked X-1 and X-2.

The Clerk: The yellow sheets will be X-1 and the white sheet X-2.

(The documents referred to were marked Defendants' Exhibits X-1 and X-2 for identification.)

Mr. Garrett: What are the titles of the two sections, may I ask, of that exhibit?

(Conference between defense counsel.)

Mr. Calverley: I understand, your Honor, that this is marked only for identification?

The Court: Marked only for identification; yes.

Q. (By Mr. Margolis): Now, with regard to the document which has been marked X-2 for identification, I notice that it has a number of titles on the left-hand side, professional and semi-professional workers, farm and farm managers, and so forth. Are those the same as the summary on W-2 which you referred to? A. Yes.

The Court: Same headings?

Q. (By Mr. Margolis): And also the headings are the [424] same, and they mean the same things,

(Testimony of William S. Robinson.)

and the figures generally are the same and mean the same thing? A. Yes.

The Court: And the columns?

Q. (By Mr. Margolis): And the columns and the computations were made in the same manner, is that correct? A. That is correct.

Q. Now, X-1 is labeled "Grand Jury Excused 1946." Can you tell us what that is?

A. These are the records from the cards of the grand jury panel who didn't serve as grand jury members in February 1946.

There is one card which could not be found, so that there are only 26 cases here instead of the 27 necessary to make up the total of 50.

Q. Which does not include the 23 jurors who actually served and for whom there were questionnaires, is that right?

A. No. Their individual records have already been put in.

Q. Is it true that X-2, then, constitutes a compilation of X-1, X-1 and W-1?

A. That is right.

Q. So as to give the entire grand jury panel for February 1946, both those who had served and those who were excused, with the exception of the one card which couldn't be located? [425]

A. That is right.

Q. Now, with regard to the left-hand column, "Employed as," on X-2, did you compute the possibilities with regard to that kind of a selection being made by an unbiased selection from a cross-

(Testimony of William S. Robinson.)

section of the community, computed in the same manner as referred to with regard to W-2?

A. No, I did not.

Q. Did you overlook making that one?

A. No. There is no reason to make it. I computed it for the total, for the four columns, and the probability here will be of the same size, approximately.

Q. You can tell that by examining it?

A. Yes.

Q. Approximately the same size?

A. Yes. It depends on the average size of the discrepancies between the observed and the handwritten figures, and they are about the same in the two columns. The probabilities are so small that there is no use in computing it.

Q. You mean the difference in probability?

A. Yes.

Q. Then you did compute the probability with regard to the total columns?

A. That is right.

Q. What decision did you arrive at?

A. The probability of getting a sample that far out of [426] line is considerably less than one chance in a million.

Q. You didn't compute the exact extent to which it is one chance in a million?

A. That is right, but I can guess at it as roughly 1 in 100 million again.

Q. How about the left-hand column, "Employed as," would it be about the same?

(Testimony of William S. Robinson.)

A. About the same. Probably it would be a little larger, that is, the sample would be. I suppose the probability would be 1 in 70 million.

The Court: How many?

The Witness: One in 70 million.

Mr. Margolis: At this time, your Honor, I offer Exhibits X-1 and X-2 in evidence.

Mr. Calverley: We object to that, your Honor, on the same grounds as heretofore specified.

The Court: They will be marked for identification and the ruling reserved.

Before you get away from that now, do you have those before you?

The Witness: No.

The Court: Hand both W-2 and X-2 to the witness.

On X-2 the total is seven professional and semi-professional workers, is that correct?

The Witness: That is correct. [427]

The Court: On W-2, two served. That would indicate five were excused, isn't that right?

The Witness: I haven't found the total column yet for W-2. That is correct.

The Court: Five were excused?

The Witness: Yes, sir.

The Court: Or five/sevenths of those called were excused.

The Witness: At least they didn't serve. I presume they were excused.

The Court: Well, the method is to find them excused or incompetent or disqualified by the judge.

(Testimony of William S. Robinson.)

These were called, summaries of persons on the jury panel, and the testimony was that they were called and those that did not serve were excused.

The Witness: I see what you mean.

The Court: Farmers and farm managers, there is one that served and one that was called.

The Witness: That is correct.

The Court: Proprietors, managers and officials, excepting farm, fourteen served and 21 were called.

The Witness: That is correct.

The Court: That would indicate one-third of those were excused.

The Witness: That is correct. [428]

The Court: Clerical, sales and kindred workers, it indicates eight were called and five served, or three-eighths of them were excused.

The Witness: That is correct.

The Court: Craftsmen, foremen and kindred workers, being the next heading, four were called and all four of them, or 100 per cent, were excused.

The Witness: That is correct.

The Court: Operatives and kindred workers, one was called and that one was excused.

The Witness: That is right.

The Court: Or 100 per cent.

The Witness: Yes.

The Court: Domestic workers, none were called.

You do not give any weight to that in your calculations here, do you?

The Witness: I don't understand what you mean.

(Testimony of William S. Robinson.)

The Court: Well, in your Exhibit W-2 you have the figures 2.5 as the number of persons in the category indicated who would have been called if they had been a true cross-section statistically extrapolated in the manner that you have testified to. Then in back of domestic workers on Exhibit W-2 you do not have anything.

The Witness: I do on my sheet.

The Court: There is none here. [429]

Mr. Margolis: That is an office copy. It isn't complete. It is on here.

We can just write it in on the working copy, your Honor.

The Witness: It was put in on the wrong line. The 2.4 should have been on the line above, and .4 next.

The Court: Domestic and protective, that was .0.

Well, there were no domestic workers called, no service workers except domestic and protective, no farm laborers, and then under "No information" there were seven called and only one served, or six-sevenths of them were excused.

The Witness: That is correct.

The Court: There was no way of knowing what their occupation might have been?

The Witness: No.

Mr. Margolis: I might say that the percentage of "No information" is much greater than in any others, because on the 26 there were only cards and no questionnaires. In all the other instances we had questionnaires. This is the one case where we

(Testimony of William S. Robinson.)

had to resort to sources other than the Commissioner's records in order to get the occupation.

The Court: Do I understand you to say that it would have made no difference by virtue of the fact that 100 per cent of the craftsmen, foremen and kindred workers were excused and three-eighths of the clerical, sales and kindred workers, that it made no difference in the make-up of this [430] jury, that it still would have been one chance in approximately 100 million?

The Witness: It would have been a chance far too small to have occurred by chance.

The Court: It is a chance far too small to have occurred by chance?

The Witness: That is right. It would still be an improbable selection, highly improbable selection.

The Court: Highly improbable selection?

The Witness: Yes.

The Court: That is to say, excusing all of these people?

The Witness: Yes.

Q. (By Mr. Margolis): Let's see, what is it that you mean would be highly improbable?

A. I mean in this sense, that if you would look at the total panel, that is, X-2, the distribution there is an extremely improbable selection from the total population.

Now, on the only way in which you could have gotten a representative grand jury would be to somehow adjust—

(Testimony of William S. Robinson.)

The Court: A statistically representative grand jury.

The Witness: A statistically representative grand jury, that is right—would be to somehow adjust for the unrepresentative nature by selecting to it from the biased jurors.

The Court: Statistically biased.

The Witness: That is right. In other words, by selecting [431] for rejection—by excusing, to be exact—15 of those persons from—well, how many—we only need in the grand jury or should have in the grand jury only 2.7 proprietors, managers and officials, and therefore you would have had to excuse 18 of them that were called on the panel.

Q. (By Mr. Margolis: In other words, you never had a chance from the start, is that correct?

A. That is correct.

The Court: A chance for what?

The Witness: A statistically representative grand jury.

The Court: That is no indication that the people who were finally selected were otherwise not impartial, though.

The Witness: No, nothing whatever.

Mr. Margolis: I would like to say, your Honor, that our motion does not go to that point.

The Court: That may be the law.

Mr. Margolis: At least that is not our understanding of the law, your Honor. Our understanding of the law is that it is not——

The Court: It must be impartially selected to be impartial. That is the effect of your motion.

(Testimony of William S. Robinson.)

Mr. Margolis: That we are entitled to a grand jury and to a trial jury selected from a cross-section of the population, using a method designed to achieve a statistically unbiased grand jury from that cross-section. [432]

Now, it may be that those statistics will work out in different ways under different situations, but if the method is such that it leads to a statistically biased grand jury, then both from an administrative and from a constitutional viewpoint the grand jury or the trial jury, as the case may be, have been improperly selected and may not act, or the indictment under the grand jury may not stand.

That is our view of the law, and we are prepared to argue that, of course, at the appropriate time.

Mr. Calverley: We take the opposite view and are prepared to argue that there is nothing in the law that requires that a grand jury be impartial on a statistical basis, or that it be selected on that basis at all.

Mr. Margolis: I didn't say that the final result has to be impartial on a statistical basis.

Mr. Calverley: Or be selected on any such basis.

Mr. Margolis: That, then, is where we part company.

I ask that this group of cards that I have marked "Federal Grand Jurors September 1946 Term" be marked Y-1, and "Summary of Occupations of September 1946 Grand Jury According to Classifications Utilized in 1940 Census" be marked Y-2. It

(Testimony of William S. Robinson.)

just happens that in this case our working records were kept on cards instead of on the yellow sheets.

The Court: They will be marked for identification. [433]

(The documents referred to were marked Defendants' Exhibits Y-1 and Y-2 for identification.)

Mr. Margolis: If your Honor please, I would like to suggest a method of perhaps saving some time with regard to each of these exhibits. I know that with regard to each of these exhibits the testimony as to the general form of the exhibit as to the method preparing the exhibit and as to what the letter and the letter 2 documents are respectively would be the same. I could go over each one and we could simply let the record show, or have a stipulation that the testimony would be the same without binding anybody to the truth or lack of truth of that testimony, and proceed a lot faster.

The Court: Would you want to stipulate, without waiving your objection, that if the same questions were asked this witness concerning the rest of these, which will be marked with the appropriate numbers, that he would give the same answers as he did to Exhibits W and X?

Mr. Margolis: Not the mathematical computations, but simply as to the manner of preparation and as to what the columns show. As to what the mathematical computations are, we will have separate testimony from each exhibit.

(Testimony of William S. Robinson.)

Mr. Calverley: So far as we are concerned, we have no objection to so stipulating, without prejudice to our right to move to strike the whole testimony on the ground of [434] immateriality at the appropriate time, and for lack of foundation.

The Court: Very well. Let us get the rest of them marked while we are at it.

Mr. Margolis: I will call these off, then.

I will ask that the yellow sheets headed "Federal Grand Jury Panel September 1946 Term" be marked Z-1, and that the "Summary of Occupations of September 1946 Grand Jury Panel According to Classifications Utilized in 1940 Census" be marked Z-2.

(The documents referred to were marked Defendants' Exhibits Z-1 and Z-2 for identification.)

Mr. Margolis: Next, your Honor, I will ask that the group of yellow sheets carrying no other heading than the first sheet bears the heading "Professional and Semi-Professional Workers," otherwise it doesn't appear to have a heading, however, they relate to these which I will ask to be marked AA-1, they relate to the document which I will ask to be marked AA-2, which is "Summary of Occupations of September 1946 Petit Jurors According to Classifications Utilized in 1940 Census."

(The documents referred to were marked Defendants' Exhibits AA-1 and AA-2 for identification.)

(Testimony of William S. Robinson.)

The Court: Do you have several copies of that?

Mr. Margolis: I think that is one on which there were several copies prepared. [435]

The Court: Very well.

Mr. Margolis: Next is BB. I ask that the "Summary of Occupations for all 1946 Jurors for Whom Information is Available According to Classifications Utilized in 1940 Census"—there are no yellow sheets because this is a summary of all of those preceding 1946—be marked BB.

(The document referred to was marked Defendants' Exhibit BB for identification.)

Mr. Margolis: As CC-1 I ask be marked "Federal Grand Jury February 1947 Term" and as CC-2 "Summary of Persons Federal Grand Jury February 1947."

(The documents referred to were marked Defendants' Exhibits CC-1 and CC-2 for identification.)

Mr. Margolis: As DD-1 I ask be marked the yellow sheets which are headed "Jurors Excused February 1947," and as DD-2 "Summary of Jurors February 1947 Excused."

(The documents referred to were marked Defendants' Exhibits DD-1 and DD-2 for identification.)

Mr. Margolis: Then EE-1 I ask to be marked "Petit Jury February 3, 1947"—those are the yellow sheets—and the white sheets, "Summary of Persons on Petit Jury February 1947" as EE-2.

(Testimony of William S. Robinson.)

(The documents referred to were marked Defendants' Exhibits EE-1 and EE-2 for identification.) [436]

Mr. Margolis: As FF-1 I ask be marked the yellow sheets headed "Questionnaires for Petit Jurors Summoned to Appear 2/17/47," and as FF-2 the white sheet headed "Questionnaires for Petit Jurors Summoned to Appear 2/17/47."

(The documents referred to were marked Defendants' Exhibits FF-1 and FF-2 for identification.)

Mr. Margolis: Then as GG-1 the yellow sheets "Petit Jury February 1947, Jury Term Returnable 2/3/47 Excused," and as GG-2 "Summary of Petit Jurors February 1947 Excused."

(The documents referred to were marked Defendants' Exhibits GG-1 and GG-2 for identification.)

Mr. Margolis: Then as HH-1 the yellow sheets, which are not headed but which are part of Exhibit GG-2, "Summary of Persons on the Jury not Drawn 1947."

The Court: What do you mean by "Summary of Persons on the Grand Jury not Drawn?"

Mr. Margolis: That means those remaining in the box out of the 822 names which we have. Your Honor will remember that out of the 855 names we only found questionnaires for 822, and there is an

(Testimony of William S. Robinson.)

explanation that the other 33 might have been sent in to the judge to be excused and never found their way back.

(The document referred to was marked Defendants' Exhibit HH for identification.)

Mr. Margolis: Then as II we ask be marked "Overall [437] Summary of Jury 1947." There are no yellow sheets for that because that is merely a summary of the previous 1947 exhibits.

(The document referred to was marked Defendants' Exhibit II for identification.)

Q. (By Mr. Margolis): Now, in order to save time, Dr. Robinson, will you please go through Exhibits Z through II and give us the mathematical computations of probabilities that you have computed with regard to each of those exhibits, stating with respect to each exhibit and with respect to each column, each of those mathematical computations and how it was made?

A. Z-2, which is the September 1946 grand jury panel, in the fourth column, that is, for the total including retired and housewives, the probability is 1 in 1 million of getting a distribution out of line as far as this one is. I am giving figures only to round numbers.

Q. You are not giving the exact, precise figure?

A. Well, in this way, if it is point and then 000065 I will call it zero 1 just to make it a convenient number.

In AA-2, which is the 1946 petit jurors—

(Testimony of William S. Robinson.)

Q. Could you give us the right-hand column?

A. I gave you only the right-hand column on that. I didn't compute the left-hand column at all. The discrepancies are, if any, larger in the left-hand column than in the right.

Q. All right. [438]

A. It is unquestionably a very small probability, and there was no use in computing it.

Q. All right.

A. In AA-2, which is the September 1946 petit jurors, for the left-hand column, that is, "Number Employed as," the probability of getting a distribution as bad as this one or worse is equal to a number which is .0 repeated for 68 times, and then a 1.

Q. That would be like the probability of 1 in——

A. It is a chance of 1 in a number which is the figure 1 followed by 69 0's.

Q. All right. How about the right-hand column?

A. That was the left-hand column. The right-hand column for the total, that is, including the retired and housewives, the possibility is 1 in a number which is 1 followed by 73 0's instead of 69 0's.

The Court: How would you say that?

The Witness: You would have to say in in powers of 10. The way a mathematician would state it, he would state it 1 by 1 times 10 to the minus 68 power.

Q. (By Mr. Margolis): There is no term such as billion or trillion?

A. You run out of those in the first few 0's.

(Testimony of William S. Robinson.)

I might add, whereas these numbers seem almost incredible, they do so to me. I have never seen a consistent set of [440] unprobable distribution of samples in my life.

Q. (By Mr. Margolis): All right. Go on.

A. BB, that is occupations for all 1946 jurors for which there are records, the left-hand column, which is for the number employed only, I have no computation because it is obviously a number about the same as the one for the right-hand column.

For the right-hand column the total of employed housewives and retired, the probability is equal to .0, and of the 0's there are 126, and then there is a 2. That is a probability of 2 in a number which is 1 followed by 127 0's.

Q. 2 over?

A. 2 over 1, and then 127 0's. I should say, from a rough estimate, that is approximately the probability that the judge would grow wings and fly about the courtroom in the next minute. The probability of physical science is of that size. It has been computed about that size.

CC, grand jury February 1947, I have the right-hand column only, that is, the total of employed, housewives and retired. The probability there is 2 in 1 million.

The Court: That is on the right-hand column?

The Witness: That is on the right-hand column for the total of employed, housewives and retired all together.

(Testimony of William S. Robinson.)

Mr. Margolis: I wonder if I could interrupt a moment and ask you to explain something. [440]

Q. Is there any relationship between a large sampling, between the difference in probabilities of a large sampling which is off a long way, and of a small sampling which is off a long way?

A. Yes.

Q. Will you explain that, please?

A. A small number of cases, 23 for a grand jury, may be quite wide of the population distribution, quite far off, and still not show a small probability.

Q. Still be within the limits of actual probability?

A. Yes. When you have a large number of cases the relatively smaller discrepancy will turn out to be very improbable, so that the test is lenient for grand jurors and less lenient for panels or for larger groups of cases.

Q. In some of these smaller groups where there appears to be about the same proportion, the chances will be 1 in a million, but in the larger groups the chances will be very much slighter of attaining that result, is that right?

A. That is correct.

Q. Now, will you go on, please? First of all, you didn't compute the left-hand column.

A. I said that, I think, previously.

Q. It would be about the same?

A. It would be slightly larger, but about the same. In DD, which is the grand jurors, summary

(Testimony of William S. Robinson.)

of grand jurors [441] February 1947 excused, the left-hand column I did not do. I have the probability for the right-hand column, that is, of employed, housewives and retired, and a very striking fact is that the probability there——

The Court: You mean that is the total?

The Witness: That is the total.

The Court: Including the number employed as well as the others?

The Witness: That is right. The probability there is 1 in 10.

The Court: One in 10?

The Witness: That is correct.

The Court: In other words, out of the same batch of persons of the grand jury that was drawn it was 1 in 2 million, is that right?

The Witness: Two in 1 million.

The Court: Two in 1 million?

The Witness: Two in 1 million.

The Court: And those that were excused 1 in 10?

The Witness: That is correct.

The Court: You can have variation, then?

The Witness: That is what happened.

The Court: That is what happened.

Q. (By Mr. Margolis): If you combined the two—we have not combined those two here for that purpose—but if you [442] combined the two, do you know about what the probabilities were?

A. The probability would be on the order of 1 in a million.

(Testimony of William S. Robinson.)

Q. In other words, if you took the original panel from which the grand jurors were excused and the grand jurors were selected, it would be about 1 in a million?

A. Yes.

The Court: In other words, if a person were deliberately setting about to get this classification, he would have to try it a million times before he deliberately excluded all of the other classes and got this proportion here?

The Witness: No, in fact, definitely not.

The Court: So then this does not indicate, do I understand, to you a deliberate bias on the part of the person who selected it?

The Witness: May I answer your first question first?

The Court: You have answered it already. You said no.

Mr. Margolis: I think it ought to be repeated.

The Court: That is the one that was actually selected.

Mr. Margolis: But deliberately, you say.

The Witness: One may select a very unrepresentative sample and take it just once. That is why I said no.

The Court: According to the decisions, it has to be a conscious exclusion. In this one here you said that it was [443] one chance in the figure 1 followed by 126 0's. To obtain that result deliberately a person would have to do it that many times, is that right?

(Testimony of William S. Robinson.)

The Witness: I don't understand your question, to attain the result?

The Court: To deliberately set out to attain that result.

Mr. Margolis: You mean using an unbiased random method?

The Court: Using a biased method.

The Witness: Using a biased method, I can do it once.

The Court: Using a biased method you can do it once?

The Witness: I will pick all of the business class and leave out everybody else, and there you have a sample which is even more biased than this one.

The Court: All right.

The Witness: The probabilities refer to picking without bias or randomly, and then it would take several billion trials in order to get a sample this much out of line.

Q. (By Mr. Margolis): Would you go on now, Doctor?

A. I think I was talking about the probability of 1 in 10.

The Court: That is DD-2.

The Witness: That is right.

Q. (By Mr. Margolis): How about the probability in the "Employed as?" [444]

A. It would be approximately the same. There is not much difference.

Q. How about EE?

A. EE-2, persons on petit jury February 3, 1947, there I did not do the first column since it is the

(Testimony of William S. Robinson.)

same approximately as the fourth, but for the fourth column, that is, the total of those employed, plus housewives and plus retired, the probability is very much less than 1 in 1 million, 1 in 50 or 100 million. The table only went to 1 in 1 million.

Q. You didn't make that extra computation that you made in some of the other instances?

A. No.

Q. The next one?

A. FF-2, questionnaires for petit jurors summoned to appear 2/17/47, I have only the total column again, since there are only 17 out of 180, 200 cases in the housewives and retired column, and in any case the columns are similar. For the total column consisting of the employed plus the housewives plus the retired, the probability is well less than 1 in a million again.

Q. GG-2?

A. GG-2, again only for the right-hand column, since the columns are similar, that is for the employed, plus housewives plus the retired, the probability is well less than a million, and that is a definite statement. My guess is it [445] would be 1 in roughly 50 million.

The Court: What was FF-2?

The Witness: That is about of the same. The probability is less than 1 in a million, and I estimate it as somewhere between 1 in 50 and 1 in 100 million.

Q. (By Mr. Margolis): HH-2?

A. HH-2 is for persons on the jury not drawn 1947. Again I have the right-hand column only, the

(Testimony of William S. Robinson.)

columns being similar and there being only 42 cases out of 400 in the two columns for housewives and retired. There I have no figure apparently for the X. The probability is probably very much less than 1 in 1 million again.

Q. That would be the same for the other column?

A. About the same for both columns. In fact, the probability would be almost incredibly small. It would be one of the probabilities such as I have computed before, that is, with a hundred or more 0's in it.

Q. Now we have the overall summary of the jury for 1047 where we have a sample of the 822 questionnaires.

A. There I have only the right-hand column again, since the results would be similar. There are 800 cases and only 70, or 10 per cent roughly, in the two columns for housewives and retired, and the results are so highly significant for the right-hand column that they must be for the left-hand column as well. [446]

The probability there is .0, the 0 being repeated 103 times, and then a 1, or roughly 1 over a number which is 1 followed by 104 0's. Again incredible probabilities entirely.

The Court: Now, Mr. Witness, you say that these probabilities would occur in the various times or chances that you have indicated. That is, they would occur if you used the system that was described this morning as used by the county in sending letters to registered voters.

(Testimony of William S. Robinson.)

The Witness: No, the probabilities would be more.

The Court: You calculated this on this table of random numbers?

The Witness: No. These are the probabilities which you would get—to begin with, these probabilities give you the chance of getting a sample as badly representative as the one in question, and they give you the relative frequency which, in taking random samples of the same size, you would get a sample that bad.

The Court: In other words, your opinion is then based upon the premise that on each of those occasions, had you used the random number system and applied it to the population here, it would have resulted in the 1 in a million or 1 in 100 million?

The Witness: Or who had selected the tickets out of the box, stirred the box and picked tickets, or used one of the [447] jury wheels that mixes the tickets. Those are random methods.

The Court: That is a random method?

The Witness: Quite.

The Court: They did use a box here and stirred the tickets.

The Witness: Therefore the presumption of this evidence is that if they used a random method, which they did, that the set of tickets from which they picked the sample was in no means whatever representative of the population. In other words, they did not have a cross-section in the set of cards. That is the very basis of the whole inference that

(Testimony of William S. Robinson.)

can be drawn from this, is that there was not a random procedure involved. Therefore, these cards did not represent anything approaching a cross-section of the population.

The Court: In order for you to determine whether they did not determine anything approaching a cross-section of the population, and in order for you to reach the conclusion that this would only occur once in 100 million times, you would have to make some calculation on what would have occurred if you had done it right, wouldn't you?

The Witness: That is correct.

The Court: Well, then, what method did you use in calculating it if you had done it correctly, or right, according to your theory, or statistically?

The Witness: You see, there are very many right samples [448] from a given population. A right sample is a sample which does not deviate from the population percentages by more than a certain amount all told for all classes taken together.

Mr. Margolis: In other words, deviation in samples is normal but there are limits of deviation.

The Court: I understand that.

The Witness: Now, those deviations are measured not in terms of the specific number of cases in the different classes for a sample, they are measured by computing a measure of discrepancy between sample and population distribution, and that measure is the measure I have been calling X^2 square.

(Testimony of William S. Robinson.)

Now, that measure, which is a measure, as I can show you very readily, of discrepancies between percentage in the population and percentage in the sample for all classes combined, your mathematics gives you a value of X^2 , which is the natural value which you would get by chance, and when a value is larger than P you say something other than chance must have operated.

The Court: Then reducing this down to terms which are simple enough for me to understand, you would say that your premise was that in using the business and professional people, that you took the 1940 census percentage of them as indicated in the census, is that correct?

The Witness: That is correct. [449]

The Court: And then you said, well, if there are that many business managers, and so forth, and they drew 40 here, then they are off so much, is that correct?

The Witness: That is correct.

Q. (By Mr. Margolis): Off from reasonable probabilities?

A. Off from the average.

The Court: Statistical probabilities?

The Witness: Yes.

The Court: Either by the random method—

The Witness: Or a wheel, a jury wheel.

The Court: With all of the names in it?

The Witness: Yes.

The Court: The whole county, if they had it and were able to get that?

(Testimony of William S. Robinson.)

The Witness: Yes, or which is quite equivalent mathematically, the records or the cards or the tickets for a cross-section of that total population.

Mr. Margolis: Now, at this time, your Honor—does your Honor have some more questions?

The Court: No, not right now.

Mr. Margolis: At this time, your Honor, I want to offer in evidence Exhibits Z-2 through II individually, and in this connection I would like to point out that the questionnaires upon which Exhibits CC-2 through II are based are in evidence.

Mr. Calverley: We object to that, your Honor, on the [450] grounds heretofore stated; lack of foundation laid.

The Court: They will be marked for identification and the ruling will be reserved.

Q. (By Mr. Margolis): I have asked you to make another calculation, Doctor. Assuming the following facts—and I might state, your Honor, what the basis for my assumption is because otherwise it will doubtless be objected to, there probably will be an objection anyway—I am obtaining my facts from the case of *Smith v Texas*, 311 U. S. 128, in which the Supreme Court made the statement: “Chance and accident alone could hardly have brought about the listing for grand jury service of so few Negroes from among the thousands shown by undisputed evidence to possess the legal qualifications for jury service.”

Now, assume—I think I have already asked you to make this computation? A. Yes.

(Testimony of William S. Robinson.)

Q. In which you assume the following facts: A situation in which Negroes constituted 10 per cent of the population, or 10 per cent of the pool from which the drawing was to be made, whites 90 per cent, and from that pool there were nominated for grand jury service 18 Negroes and 512 white persons, and there served five Negroes and 379 white persons.

I think you have your sheets here with your calculations on it? [451]

A. I have the probability, if that is all you want. I copied that off.

Q. What are the probabilities of that sort of a result being achieved?

A. If there had been random selection with regard to color, the probabilities are 8 in 1 million of getting that few Negroes as observed.

The Court: I think this might be an appropriate time to recess.

Mr. Margolis: Very well.

The Court: How many more witnesses have you?

Mr. Margolis: This is our last witness, and I would say that I have on direct examination probably another 20 minutes to half an hour.

The Court: Barring interruptions by the Court?

Mr. Margolis: I am speaking about my examination, your Honor.

The Court: How many witnesses do you have?

Mr. Calverley: At this time, your Honor, I don't believe we will have any that I know of.

The Court: Very well. Recess until 10:00 o'clock tomorrow morning.

(Whereupon, at 4:30 o'clock p. m., an adjournment was taken until 10:00 o'clock a. m., Friday, February 21, 1947.) [452]

* * *

WILLIAM S. ROBINSON,

the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

Mr. Margolis: While the witness is taking the stand, your Honor, we have borrowed from the public library and would like to show to counsel and your Honor the volume of population census, characteristics of the population of California, [459] prepared under the supervision of Dr. Leon E. Truesdale, which we have, published in 1942 and being the 16th census of the United States, 1940. It corresponds with our information upon which the statistical data was computed, which appears at page 52 of the volume that I have indicated.

* * *

Q. (By Mr. Margolis): I want to show you the document which I have just referred to and which I have shown to counsel and to the Court, particularly page 52, and ask you whether or not those are the figures that were used in connection with the computations that you have testified about yesterday. A. Those are the figures.

Q. Now is there in Los Angeles, for Los Angeles County, an available breakdown—I will withdraw that.

(Testimony of William S. Robinson.)

I notice that in the Los Angeles County figures the breakdowns are given by major headings, that is, professional workers, craftsmen, proprietors, and so forth. A. That is correct.

Q. And not by the subheadings which were referred to [461]

The Court: It is given by the major headings, of which there are 11, is that correct?

Mr. Margolis: Well, in this case, if your Honor please, for example we have combined, because they were combined in Los Angeles city, professional workers and semi-professional workers, so there are 12 here instead of 11. But they are the same headings except that in one instance professional and semi-professional is combined and in the other instance they are separate.

The Court: Very well.

Q. (By Mr. Margolis): Now in the Los Angeles city figures, in the volume that we referred to yesterday, also for the 1940 census, there are the subheadings such as under professionals you have actors, architects, artists and art teachers, and so forth? A. Yes.

Q. What relationship, if any, is there between the subheadings in the figures for Los Angeles city and the main main headings in the figures for Los Angeles County?

A. The subheadings for Los Angeles city for any major classification is such as professional workers are identical with the subheadings not appearing for the county figures.

(Testimony of William S. Robinson.)

Q. Not appearing? What do you mean, they are identical then? [462]

A. That is, the county figures are given only by major headings, but when they were tabulated by the census, the same subheadings were used as are given for the city.

The Court: In other words, under the heading there, professional and semi-professional workers in the county, they included everything from actors to surveyors? [463]

The Witness: That is correct.

* * *

Mr. Margolis: I think it probably will not be necessary to show you the exhibit marked for identification in order to direct your attention to something I think you have in mind, Doctor.

Q. I note that on Exhibit AA-2 for identification there appear to be out of a total of—I will use the right-hand columns, the total columns for this purpose because they are so similar to the other columns—there appear to be a total of 86 businessmen, managers and officials out of a total of 188 altogether, or close to 50 per cent, slightly under 50 per cent, and out of the 86 businessmen—this is on page 3, your Honor, which is from a standpoint of headings—there appear to be 38 out of the 86 engaged in finance, insurance and real estate, or almost one-fourth of the total and almost one-half of the businessmen.

Now in making your computations of probabilities, did you take into consideration such factor as

(Testimony of William S. Robinson.)

the large number of finance, insurance and real estate people within the number of businessmen or did you just take into consideration the totals in each of the overall categories?

A. Just the totals in each of the overall categories.

Q. Now if you had taken into consideration factors [466] such as finance, insurance and real estate, showing 38, or almost half of the businessmen, would that have affected the probabilities?

A. It would have made the probabilities considerably smaller than they were.

Q. You found, did you not, without going into detail because the exhibit speaks for itself, similar illustrations of a large preponderance of businessmen of those engaged in finance, insurance and real estate, isn't that so?

A. I think it occurs in every one of the exhibits.

Q. Where there is a breakdown? A. Yes.

Q. Now, Doctor, with regard to the overall preponderance or overweighting of one group as compared to another, did you notice anything specific with regard to a tendency or trend for overweighting of certain groups and underweighting of others?

A. In every exhibit there is a tremendous overweighting of proprietors, managers and officials. In a great preponderance of the exhibits there is an underweighting of the opposite types and there is an underweighting generally of craftsmen, domestic service workers and the lower classes in the scale.

(Testimony of William S. Robinson.)

Q. How about laborers?

A. They are underweighted almost perfectly. There are very few of them. [467]

Q. I think you were in court when there was testimony with regard to the utilization of cards which had been accumulated at least since 1925 and probably prior to 1925 from 25,000 or 30,000 cards from which names were drawn for the selection of jury panels.

A. I was.

Q. In your opinion, Doctor, how would that affect, with reference to Los Angeles County, the possibility of obtaining a fair cross-section of the community?

A. It would militate obtaining a fair cross-section.

Q. Why?

A. Well, in particular it would have the effect of underweighting the lower classes on the scale, that is, the classes which come near the bottom of the list; in particular, craftsmen, operatives, possibly service workers, certain laborers. It would do so for the reason that migration into this region, especially during the war years, was primarily in those classes so that they are proportionately better represented in the population now than they were in previous years.

Q. Do you have any figures on that?

A. Well, I have some figures which give a rough indication.

The manufacturing employment—these are California [468] Department of Labor statistics—man-

(Testimony of William S. Robinson.)

ufacturing employment for Los Angeles in 1935 was 94,000. Now that is mainly operatives and craftsmen. In 1946 the average for the year was 239,500. Now those figures in themselves mean nothing, but if you relate them to the population at the time, in 1935 manufacturing employment, that is, mainly operatives and craftsmen, constituted 3.8 per cent of the total population; in 1946 they constituted 6.9 per cent of the population, or almost twice the percentage in 1935.

In other words, they are more heavily weighted in the population now, and any lists based on previous years would naturally not give them the importance which they have in the population at the present time.

Q. Even though they had been drawn in the first instance as a cross-section, is that right?

A. That is right.

The Court: What is it presently?

The Witness: 6.9 per cent.

The Court: That is to the total population?

The Witness: Yes.

The Court: That is craftsmen and workers?

The Witness: In the main.

The Court: In the main?

The Witness: Yes.

The Court: What did you call them? [469]

The Witness: Manufacturing employment.

The Court: Well, now, that population includes babies?

The Witness: That is true.

(Testimony of William S. Robinson.)

The Court: I suppose I in this premise can take judicial notice of the fact that babies are not lathe operators, and so forth?

The Witness: That is correct.

The Court: Then your figure would be larger, would it not, of the persons who were over 21 years of age of that particular class?

The Witness: Yes. But the sole point of the comparison, the sole point is a comparison, let's say, between 1935 and 1946, and the total labor force, which is the base we would like to use, would constitute the same proportion of the total population, very closely, in the two years.

The Court: How do you reach that conclusion?

The Witness: I reach that conclusion from observation and experience. I reach it in another way, if you like. The migration to Southern California is not the migration of single workers, but they bring with them their wives and their children, as is a well-known fact in the present housing conditions.

In other words, when you get a larger working population, labor force, you get a labor total population in about the same ranges. The people who migrate here are no different [470] in their composition, in their marital relationship from the people who lived there originally. So the figures based upon the total population, while not the right size for the total labor force, are nevertheless proportional to figures which would be based on the total labor force.

(Testimony of William S. Robinson.)

In other words, were we to base the figures on the total labor force rather than the total population percentage of the total labor force in this class, in 1946, it would be roughly double that in 1935.

Q. (By Mr. Margolis): And the percentage which these persons constitute of the total labor force would be much greater?

A. That is true.

Q. Than the percentage they constitute of the total population?

A. That is correct.

Q. So that the possibility of discrimination is increased when you take into consideration the total labor force instead of the total population, is that correct?

A. That is correct.

Q. Now also those figures do not take into consideration, do they, the families of the men?

A. They do not.

Q. And the figures would be increased by that if you considered the families? [471]

A. That is correct.

Q. Now is there any known experience about the extent to which workers move from city to city and place to place as compared with businessmen?

A. There is.

Q. What is the fact?

A. Workers migrate to a much greater extent than businessmen.

Q. What effect would that have?

A. Persons in the classes of craftsmen, foremen, operatives in particular, are known to be

(Testimony of William S. Robinson.)

considerably more migratory than proprietors, managers and officials.

Q. What effect would that have on the use of a list running back to 1925 or before that?

A. Since there has been an in migration to this region, it would tend to underemphasize or not to give due importance to the migratory element in the labor force, namely, craftsmen, operatives, and so forth.

Q. Another point that I want to get at, how about the possibility of migration out of the city of businessmen, or out of the county, of businessmen included in those 25,000 or 30,000 cards as compared with the possibility of migration out of the county of craftsmen or operatives or laborers who might have gotten into these cards?

A. If there were such migration, businessmen would [472] remain and workers would tend to migrate.

Q. That would be the general tendency?

A. Yes.

Q. Now during the testimony here there were a number of sources that have been referred to as having been used for the purpose of obtaining names. Now one of the sources—I think the most common source—was the telephone directory. Now assuming that names were obtained from the telephone directory in the best random method, in the most unbiased from a scientific standpoint method, would there be any probability of getting a cross-section of the community?

(Testimony of William S. Robinson.)

A. There would be an extremely small probability of getting a cross-section of the community.

Q. What do you mean by extremely small, running up into the millions?

A. Or the quadrillions.

Q. Why?

A. The reason is that the telephone book is biased statistically, I would say, upward economically. The lower economic classes are extremely underrepresented in the telephone book.

Q. Do you have any figures at all that you can give us to indicate that?

A. There have been a number of studies of telephone book representation for one thing, but there are data available [473] here which give us at least a rough indication of the fact that there are many families excluded, or many persons excluded, from the telephone book.

In 1947 the figures given by the telephone company for Los Angeles County are 562,000 residential telephones. If we multiply that figure by 3 or 4, which is somewhere around the number of persons per family, we get, let's say, 2 million persons for the population of Los Angeles County. Well, the known population of Los Angeles County is above 3 million.

Q. It is estimated at 3½ million.

A. That is right. In other words, there are a million and a half persons who are not in the telephone book, and those persons could be very easily shown to tend to be low income persons. In fact, they tend to be in the very low income ranges.

(Testimony of William S. Robinson.)

The Court: The estimated population, as I got the figures yesterday, is 3,747,962. What percentage of those are under 21? Do you have any studies on that, or any figures?

The Witness: We know the general shape. I can guess, if you like, though the figures are easily available.

The Court: Can't you figure that one out?

The Witness: As I say, I can make a good guess for it.

The Court: You haven't been guessing here, have you?

The Witness: No. That is why I refused to give you a statement now unless you label it as a guess. The figures [474] are available if you care to have them.

The Court: Where are they available?

The Witness: They may be available in the census volumes. They are easily available in the library.

The Court: That is to say, on past figures, on the 1940 census, for instance, the total population will give you the number of persons who were under 21?

The Witness: Yes. You can find the age distribution for the population by 5-year periods. You can find a summary figure always for the population 21 years or over, as well as the population 10 years of age and over.

The Court: Would that be in this volume you have for Los Angeles County?

The Witness: I don't know.

(Testimony of William S. Robinson.)

Mr. Margolis: I haven't examined all of that volume.

The Witness: I believe that is for the labor force and it may not be.

The Court: What do you mean, the labor force?

The Witness: The labor force is the population 14 years of age and over gainfully employed. There are many such bulletins on population issued by the census.

The Court: I understand, but that is the general characteristics?

The Witness: Then we should be able to find the population 21 years of age and over here.

The Court: Well, isn't there any standard figure used by statisticians that in a million people so many are under 21?

The Witness: There is not, for the simple reason that age distributions by cities, by counties, by states, and by nations differ markedly in their shapes and in the percentage of people of any age.

The Court: They do that more so than other distributions of labor and occupation, race and religion?

The Witness: There is no statistical basis for making a comparison of that sort. I simply can't answer that.

The Court: You can't answer that?

The Witness: No. There is no valid way statistically of answering that, as to the variability of different distributions.

The Court: Can you find that in there?

(Testimony of William S. Robinson.)

The Witness: I can look for it.

The Court: Well, now, there is a standard figure that you use for families, isn't there?

The Witness: Yes.

The Court: I was asking you a while ago about that.

The Witness: Yes.

The Court: Wouldn't there be some standard figure for

The Witness: If you ask me the mean age, I can tell you yes. [476]

The Court: You said the number of workers that come here would be the same for people who were under 21 because they brought their families with them and it wouldn't make any difference, that the proportion would be the same?

The Witness: That is right. And likewise—let me give you another example—the percentage of persons 21 years of age and over for the various states would be quite closely the same, if you except a few states, Wyoming in particular, South Carolina in particular, Montana, Washington, D. C., which is given as a state in the figures ordinarily, and if you except California and one or two other states. But what that percentage is I don't know because there is a percentage of 21 years and over, 22 years of age and over, 97 years of age and over, over 2 years of age and over, and all the rest. I don't carry all those figures in my head. As I say, I can find them if you want. I carry important things in my head.

(Testimony of William S. Robinson.)

The Court: See if you can find that in that book.

The Witness: I will see if I can find it.

Page 38 has age, race and sex by counties, 1940-1930. Here is given the ages for counties by 5-year age groups. So if we take—it is not given by yearly groups, though, in the detailed classification volumes, the big volumes, of which these are a small reprint, but you would be able to get the population 21 years of age and over. So far as the actual [477] age distribution, it is given by 5-year classes, so we can find the percentage of the population, let's say, 20 years of age and over, not 21.

The Court: Have you got that there?

The Witness: I can compute it.

The Court: For Los Angeles County?

The Witness: I have to find Los Angeles County first, for both male and female. If you can trust my addition, the figures will be roughly these—

The Court: Shouldn't we trust your figures after having given us all these mathematical computations?

The Witness: Statisticians are notoriously bad at mental arithmetic. When I did these calculations I used a calculating machine, with known checks on my operations.

The Court: By the way, did you do all these computations yourself?

The Witness: I did.

The Court: Or somebody working under your direction do them?

(Testimony of William S. Robinson.)

The Witness: I did them myself.

The Court: They are all your personal calculations?

The Witness: Yes, and they are all checked.

Q. (By Mr. Margolis): None of them are done by the arithmetical method, are they? [478]

A. No.

There were in 1940, 725,000 persons in Los Angeles County under the age of 20, and there were all told—wait a minute, I think I can get 21 years of age and over all told—there were in Los Angeles County in 1940, 202,000 persons, that is to the nearest thousand, 202,000 persons 21 years of age and over.

Q. (By Mr. Margolis): Do you mean over or under?

A. Twenty-one years of age and over.

Q. In Los Angeles County?

A. I am sorry. I am properly chagrined. There were 2,019,000 persons 21 years of age and over. The total population was given in 1940 as 2,786,000 if we deal only with thousands, and the difference would be 767,000 persons under—I am sorry.

The Court: 786,000 persons who would be under 21 years of age.

The Witness: 767,000 I get.

The Court: What was the last figure?

The Witness: 767,000.

The Court: There is 2,019,000 twenty-one years and over, and a total of what?

The Witness: A total of 2,786,000. That gives 767,000 under 21. [479]

(Testimony of William S. Robinson.)

The Court: What percentage is that?

The Witness: I have no slide rule with me but I can divide it.

The Court: About 25 per cent, isn't it?

The Witness: It is a little more than 25 per cent.

The Court: Not much. If it were 700,000 even an 2,800,000 even it would be exactly 25 per cent.

The Witness: That is right.

The Court: So it is about 25 per cent.

The Witness: But it is less than 2,800,000 and it is considerably more than 700,000. In fact it is 30 per cent at least.

The Court: It is 30 per cent?

The Witness: No, I am sorry. It is 28 per cent roughly.

The Court: 28 per cent?

The Witness: 28 per cent or 29 per cent. The figure I was going to give you, my guess, was 30 per cent.

The Court: To get an approximation it would be $27\frac{1}{2}$ per cent, is that right?

The Witness: That is approximately.

The Court: You say $27\frac{1}{2}$ per cent?

The Witness: My guess is that it is closer to 29, but I am not sure.

The Court: That is a lot of people. Which one do you want to say? [480]

Mr. Margolis: Did you compute it exactly?

The Court: Which one is your opinion?

(Testimony of William S. Robinson.)

The Witness: We don't need to worry about it if you will let me go to the table and get a slide rule.

Mr. Margolis: Do you have your rule there?

The Witness: Yes. (Making calculation) The answer is 27.6 per cent. So you were right on the nose, so to speak.

The Court: Roughly 27½ per cent.

The Witness: Yes.

The Court: So that you would say that the population increases with the population increases and that the percentage today would be about the same?

The Witness: Correct.

The Court: All right.

Q. (By Mr. Margolis): Now you were discussing the change in the character of the population here.

A. That is correct.

Q. Had you finished your answer on that?

A. Except for perhaps summarizing it. The change in the character of the population has not been one particularly in age distribution or sex distribution but mainly one of occupational distribution. I think, in fact, we had gone on to the telephone book, hadn't we?

Q. Yes. That is why I was hesitating. I wondered [481] how we had gotten back to that.

On the telephone book you had said that there were 567,000—

(Testimony of William S. Robinson.)

A. 560,000 residential telephones, 562,967, as given by the telephone company.

Q. And you considered that that covered roughly 2½ million people and you were counting people of all ages? A. That is correct.

Q. And when you say that roughly a million and a half people are not in the telephone book, that includes people of all ages, is that right?

A. Yes, and not merely babies in houses separately.

Q. So that all that we get there is a proportion figure, say of roughly somewhere in the neighborhood 2 to 1? A. That is correct.

Q. So maybe one-third of the people in Los Angeles County, somewhere in that neighborhood, are not in the telephone book?

A. That is correct.

Q. I think you said that as to that one-third they would be mostly if not almost entirely in the lower economic groups?

A. That is correct.

Q. Now another source that was used to a much more limited extent was—— [482]

The Court: Pardon me, while you are on the telephone book. Do you have any figures on the number of people who have telephones who are not listed?

The Witness: I have no figures, but it is a very small percentage of the total.

The Court: How do you know it is if you have no figures?

(Testimony of William S. Robinson.)

The Witness: I went into the matter once for Manhattan Island in New York, and the percentage was less than one-tenth of 1 per cent.

The Court: That was in New York?

The Witness: That was in New York.

Mr. Margolis: We can get that figure, your Honor.

The Court: I am just trying to find out the basis of his opinion. I know that those things do occur.

The Witness: They occur, that is true, but they are a very small percentage of the total. They are available for Los Angeles at the moment, if you would like to have them.

The Court: Those that are unlisted?

The Witness: Yes. Not the listings but the number of them that are unlisted will be available.

Q. (By Mr. Margolis): All right. Now another source that was used, Dr. Robinson, was some list of registered automobile owners. It wasn't made quite clear whether that was a list of a certain type of automobile owners or a list of all automobile owners, [483] or exactly that it was, but it was a list which was believed to be furnished to insurance companies. Now with that kind of knowledge about the list that was used, would you have any opinion as to whether such a list would be calculated to give a representative cross-section of the community, even though names were drawn from it completely at random and scientifically?

A. It would not give a representative selection from the community.

(Testimony of William S. Robinson.)

Q. Why not?

A. It will be biased more probably than the telephone book itself upward economically. That is, it will not include persons of low income groups, low economic status, and particularly so if it is a list such as lists given to insurance brokers or companies for the reason that those are new automobiles that insurance companies are particularly interested in.

The Court: Let's see, while we are on the subject of automobiles, do you have the figures recently released—I saw them but I have forgotten them—on the number of automobiles in Los Angeles County in ratio to the population?

The Witness: No, but it will be a very large number in comparison with other sections of the country.

The Court: As I recall, the figure was something like 1 automobile to 2.2 persons, or something like that. [484]

The Witness: That is correct. So that those persons not on the list will be very low income persons.

The Court: Will be very low income persons?

The Witness: That is right.

The Court: Do you think that they would be apt to be registered voters?

The Witness: They are very much more likely to be registered voters than automobile owners.

The Court: Upon what do you base that?

(Testimony of William S. Robinson.)

The Witness: Upon at least, I should say, 25 studies of the representativeness of publicly available lists of that sort.

The Court: That is, of registered voters?

The Witness: Of registered voters, of automobile owners, of automobile registrations, of telephone books, of city directories—what other lists are there—those are all that I can think of at the moment. But that subject has been gone into very thoroughly by people who do professional sampling.

The Court: Did you ever do that in Los Angeles, for instance, among the Mexican population, of which there is a very large segment here? I think it is estimated to be some place in excess of a quarter of a million Mexicans. Did you ever determine what percentage of them own automobiles and are not registered voters?

The Witness: No, but I have read four studies dealing [485] with that subject in Los Angeles for all racial groups that are important here.

The Court: On the question of whether or not they own automobiles and were and were not registered voters?

The Witness: On the question of relative representativeness of those kinds of publicly available lists.

The Court: Of those kinds of lists?

The Witness: That is correct.

The Court: But do you have any figures at all, or do you know anything at all, about the number

(Testimony of William S. Robinson.)

of Mexicans that are registered here compared to the number that reside in Los Angeles County?

The Witness: I have no figure, and I don't believe one could get them because the citizenship of, and even the nationality of, Mexicans is not given in the 1940 census, as Mexicans are counted as whites.

The Court: You could get enough information to form some opinion, couldn't you?

The Witness: If I set out specifically to do so with, let's say, a crew of interviewers I could probably do that.

The Court: Most of the welfare agencies, a lot of the Catholic churches and schools, public schools, have records indicating the Mexicans, do they not?

The Witness: That is correct, they do.

The Court: But you are not prepared then to express an [486] opinion as to the number of Mexicans, and so forth, that are here in the total population because that figure isn't given in the 1940 census, and you are not prepared to express an opinion as to the number of Mexicans or percentage that are registered who do live here?

Mr. Kenny: Your Honor, could I break in, because that is a very important point. The public schools, I am quite sure, do not make a segregation—and I think this is for the good name of our community—they do not attempt to classify children of Latin-American parentage as anything other than white, nor is there any effort made in the public schools to do so.

(Testimony of William S. Robinson.)

The Court: Weren't you asking me some question a while ago about some Mexican names?

Mr. Kenny: Precisely.

The Court: In order to point out people whose names were Mexican?

Mr. Kenny: I didn't want that to go unanswered in the record, that the public schools of Los Angeles County, where I was their legal advisor for a long while, did conduct any such discrimination between children as to race. I just didn't want to let that stand unanswered in the record.

The Court: No one is making such a statement for the record.

Mr. Kenny: I think your Honor commented to that effect [487] I just want to have it straightened out.

The Court: You have made your statement for the record.

The Witness: May I finish answering the question?

The Court: Judge Kenny's remarks led my mind off into this questionnaire that is proposed. They ask, what is your race, in the questionnaire recommended by the Conference of Senior Circuit Judges. Is that discrimination?

Mr. Kenny: I think so, your Honor. I would think so. I think if they had thought it through they certainly wouldn't have done it.

The Court: All right.

(Testimony of William S. Robinson.)

Mr. Calverley: If the Court please, in that connection I would like to interrupt. As I recall it on that particular exhibit, regarding the recommendation of the judicial Conference of Senior Circuit Judges, there was reference made to a subsequent report, or recommendation of Judge Knox' committee, which the clerk was not able to locate here in this building. A request was made of the attorney general as to whether or not there had been a subsequent report and what recommendations were made, and we have here a copy of our teletype to the attorney general for that purpose, and also a copy of the reply which I would like to introduce in evidence.

The Court: They will be made a part of Exhibit 2, if there is no objection.

Mr. Calverley: I note in it, however, that the recommendation [488] was—I believe that that was question No. 13—that question 13 be eliminated, which refers to race.

The Court: Whatever it is, this is the official Exhibit No. 2.

The Clerk: Yes, your Honor.

(The documents referred to were received and made a part of Government's Exhibit No. 2.)

The Court: Is there any objection to it becoming a part of the record?

Mr. Margolis: No. It supports Judge Kenny's position.

(Testimony of William S. Robinson.)

The Court: All right. Will you read the question?

(The question referred to was read by the reporter, as follows:

("The Court: But you are not prepared then to express an opinion as to the number of Mexicans, and so forth, that are here in the total population because that figure isn't given in the 1940 census, and you are not prepared to express an opinion as to the number of Mexicans or percentage that are registered who do live here?") [489]

The Witness: I did not and I would not venture to guess at the percentage without making some kind of investigation into the information which is available.

The Court: Without setting up a formula?

The Witness: Without setting up a formula.

Q. (By Mr. Margolis): Do you know of any studies which have been made on that precise subject?

A. None explicitly and completely dealing with Mexicans.

Q. But there have been studies made with regard to the representativeness of lists of registered automobile owners generally as compared with, say, the motors registered?

A. Yes, and not only that but of the racial representativeness, if that is the major concern here.

(Testimony of William S. Robinson.)

Q. And what has the showing been?

A. That the registered voters are more—I am sorry—that races are much more adequately represented among registered voters than among automobile registrations.

Q. One of the lists that was used a number of years ago, a few names, was from railroad brotherhoods. Would that be representative of the community? A. It would not.

Q. Why not?

A. Because naturally it would underrepresent the classes except the particular classes into which railroad [490] people might fall. I suppose mainly it would overrepresent operatives and would certainly underestimate professional, managers and officials.

The Court: That is employment classes, you are not thinking of social, racial or religious classes?

The Witness: Occupational classes.

The Court: Occupational classes only?

The Witness: Yes.

I might add that social, racial and religious classes are very highly correlated with occupational classes, so that when you talk of one you are talking of the others at the same time. Catholics tend to be in the lower occupational classes in this list and Protestants in the higher. The relation is not tremendously strong but it is a very pronounced tendency. And the same is true of racial and other kinds of classifications.

(Testimony of William S. Robinson.)

The Court: So that in your opinion, if you have an occupational cross-section you have a representation of all racial, religious, economic and social classes?

The Witness: Occupation is one of the best control factors as a statistical factor in getting a representative sample.

The Court: Read the question again.

(The question referred to was read by the reporter, as follows: [491])

(“The Court: So that in your opinion, if you have an occupational cross-section you have a representation of all racial, religious, economic and social classes?”)

The Witness: If it is phrased in absolute terms I cannot answer.

The Court: I asked for your opinion. Read it again, Mr. Reporter.

(The question referred to was reread by the reporter, as set forth above.)

The Witness: You will get better representation of all economic, racial and religious classes if you have a cross-section of occupations than if you do not.

The Court: Let's strike the answer out. You mean to say you cannot answer that question? You do not have an opinion on it?

Mr. Margolis: If your Honor please——

The Witness: I have an opinion.

(Testimony of William S. Robinson.)

The Court: It isn't a question of the better representation here, the Court says that you have to get a fair cross-section of the community representing racial, social, economic and religious classes. So that is what this ultimate inquiry is about.

Mr. Margolis: I think it would be proper to ask the witness at this point whether the utilization of occupational classifications would be a sound method of obtaining a [492] fair cross-section.

The Court: I think that is my question.

The Witness: It would.

The Court: Will you read that question again, Mr. Reporter?

(The question referred to was read by the reporter, as follows:

("The Court: So that in your opinion, if you have an occupational cross-section you have a representation of all racial, religious, economic and social classes?")

The Witness: You see, I want to protest, if I might, against that question. If you will give me sufficient time I can explain to you why I cannot answer it. But it makes no sense in statistical terms.

The Court: It makes no sense?

The Witness: It makes no sense. It is utterly meaningless in the terms of operations which a statistician performs, and I can show you—or I can try to restate it so that it is satisfactory for you and still be answered. As it is stated, I cannot answer it.

(Testimony of William S. Robinson.)

The Court: Then I have a witness here who can pull himself up by his own bootstraps and make himself qualified on any subject at any time—a witness who is going to ask the questions and answer them too.

Mr. Margolis: May I point this out, your Honor? With [493] regard to your question——

The Court: Do you object to my question?

Mr. Margolis: Yes.

The Court: State your ground of objection.

Mr. Margolis: On the ground that it is ambiguous and uncertain.

The Court: The objection is overruled. If that is ambiguous and uncertain, I don't know what we have been talking about here all week.

Mr. Margolis: May I state the basis for it?

The Court: If it is an extension of the argument on the basis that it is ambiguous and uncertain, I do not care to hear it.

Mr. Margolis: If your Honor please, I would like to point out something with regard to that question that I think your Honor should hear. I think it is only fair that your Honor should hear it.

The Court: Go ahead and point it out.

Mr. Margolis: When you ask whether that will result in the representation of all classes——

The Court: I did not ask him that. I asked him if in his opinion——

Mr. Margolis: It would result in the representation.

The Court: That is right.

(Testimony of William S. Robinson.)

Mr. Margolis: All right. Obviously if you took, let [494] us say, a sample of 10 people it would not result in a representation of all classes but it would result in an opportunity of getting a fair cross-section.

The question as to whether it would result in a representation of all classes depends upon the size of your sample. If your sample is 3 people it cannot result in a representation of all classes.

The Court: Let me hear the question again.

(The question referred to was read by the reporter, as follows:

("The Court: So that in your opinion, if you have an occupational cross-section you have a representation of all racial, religious, economic and social classes?")

The Court: Do you understand that question? Do you understand what occupational cross-section in that question means?

The Witness: My difficulty is this, you haven't said an occupational cross-section where you select randomly from the occupations.

The Court: I think that that is a fair assumption from that question, if you have an occupational cross-section of the community. I didn't intend to put in the random selection there. If you have an occupational cross-section of the community—well, there is the question. [495]

(Testimony of William S. Robinson.)

The Court: Will you read the question again, Mr. Reporter?

(The question referred to was read by the reporter, as follows:

("The Court: So that in your opinion, if you have an occupational cross-section you have a representation of all racial, religious, economic and social classes?")

The Witness: Not necessarily.

The Court: Go ahead.

Q. (By Mr. Margolis): Will you explain that answer, Doctor?

A. Yes. I can pick a sample with bias, an intentional bias, so that it will have the right proportion of all occupations in it, but it is composed only of Catholics, or only of Protestants. If I have a random selection within the occupational cross-section, then it will be representative of the racial, religious and other groups.

The Court: When you say random, you mean a statistical random?

The Witness: That is correct. [496]

Q. (By Mr. Margolis): And the method, for example, that is being used in the Superior Court you would consider a statistical random method, is that right? A. Yes.

The Court: Do you have any opinion how to get a statistically random method here where we have a man who is paid \$15 every six months, and

(Testimony of William S. Robinson.)

a jury commissioner and a clerk who has to have his help do it in between other things?

The Witness: I do.

The Court: What is it?

The Witness: I can show him very simply, showing a table of random numbers, how to take names from the voters' registry as fast as any typist can type them off, purely at random from the voters' register.

The Court: Will you tell us? Will this interrupt your questioning?

Mr. Margolis: No. Go ahead.

The Court: Sooner or later I suppose you are going to get to it anyhow?

Mr. Margolis: Yes.

The Witness: The procedure would consist of using, let's say, two tables of random numbers, or two sheets of random numbers that are different, one for selecting the page or the sheet from the voters' register, and the second for [497] selecting from that page or sheet——

The Court: By that you mean precinct?

The Witness: Precinct—the second for selecting from that precinct at random one or more of the names in that precinct.

Q. (By Mr. Margolis): It would depend on the number of names you wanted as to how the selection would be made?

A. Yes. But if you went along doing this selecting first a precinct at random, then at random a name within the precinct, you would have a ran-

(Testimony of William S. Robinson.)

dom sample wherever you stopped. It could be done as quickly as the names could be typed on this sheet.

The Court: That is, provided you had the sheets available?

The Witness: That is correct.

The Court: Let's take this random number sheet, table of random numbers. Are there several tables of random numbers?

The Witness: There are several tables and the tables are many pages. I have an extended table. I am not sure whether I have it with me or not.

Q. (By Mr. Margolis): Do you have it with you?

A. I think I had it in my car. I had it with me yesterday. [498]

The Court: This is just one page?

The Witness: This is just one page from a fairly extensive table.

The Court: How do you pick your random numbers, by another system of random numbers?

The Witness: They are picked in a number of ways. They are picked by machines, what are called random machines; sometimes numbers are put on physical circular slips in a great drum and stirred and drawn out. There are various ways in which they are picked.

The Court: That is the way these numbers are drawn? In other words, these are drawn similar to the drum of marbles that you were talking about?

(Testimony of William S. Robinson.)

The Witness: I don't believe those were picked in that way. I believe they were picked as the third from the last digit in a column of census figures for England and Wales.

The Court: The third from the last digit?

The Witness: Yes, of the population, as I remember, of the counties or shires or something of the sort, from the census figures of England and Wales.

The important point is not so much how they are picked, as it is the fact that they have been tested, that is, they have been used to check established mathematical derivations and they give the results which the mathematics calls for. [499]

The Court: This table of random numbers, Exhibit V, at the top you have consecutive numbers 1 to 20, that is, there are 20 columns.

The Witness: Those are simply numbered columns.

The Court: And you have 45 lines.

The Witness: That is correct.

The Court: Now there are 5894 precincts. What would be the first thing you would do in picking a precinct?

The Witness: I would take blocks of the first four columns of digits, that is, the digits occur in pairs so I would take the first two pairs, say the left-hand four rows——

The Court: The left-hand?

The Witness: The left-hand four columns, I should say: There are four digits on the first row

(Testimony of William S. Robinson.)

at the very left-hand side. If you will read them off to me I will tell you what I would do.

The Court: 22, 17, 68—

The Witness: 22, 17 are the first four. I would pick Precinct 2217 to get my first name from.

The Court: Then you would take another table of random numbers?

The Witness: And if they were only, let's say 1000—I suppose precincts might run to 1000, might they, in population?

The Court: No. Precincts average about 350.

The Witness: Then I would take three digit numbers for my other table, and if you want to read me the fifth, sixth and seventh digits?

The Court: I will read the one under Table 16 and 17; there is 61, 09.

The Witness: 610 would be the number because there are only three digits required. I would disregard that number until I came to a number without a zero.

The Court: The next column would be 85, 52; the next one is 16, 71.

The Witness: I would pick the 167th name from precinct, whatever precinct we decided on before.

The Court: Those names are not numbered.

The Witness: Then they would have to be numbered.

The Court: Somebody has to count down to the 167th name then?

Mr. Margolis: I believe those names are numbered.

(Testimony of William S. Robinson.)

The Court: Let's see the precinct sheet.

Mr. Margolis: They are on some of the precinct sheets.

The Witness: If they are not numbered there are other ways of doing it.

The Court: (Examining exhibit) They do not number them.

The Witness: Then there will be some easy way of doing it, some adaptation of this perhaps to pick columns at random and then items within columns or something of the sort. [501]

The Court: Hold it up, Mr. Clerk. Let us see how many columns and names there are.

The Witness: Are the names one to a line only?

The Clerk: There are four columns.

The Court: There are four columns?

The Witness: It is possible to prepare a key sheet which is laid over that, or alongside of that, which has the numbers on it which can be used for each precinct sheet.

The Court: Then what you would do is, you would pick the 167th name in every precinct?

The Witness: No, just in that one precinct. Then I would select another precinct at random and I would select a name from that one.

The Court: You would take the next number, 192?

The Witness: No, I need a 4-digit number for the precincts.

The Court: Why a 4-digit number?

(Testimony of William S. Robinson.)

The Witness: Because precincts run to 5000. That requires four digits. What are the four numbers?

The Court: 19, 36.

The Witness: Then I would pick Precinct 1936. Then randomly I would like to pick one name from within that.

The Court: Now Precinct 1936 is up high in the city of Los Angeles, but as I recall there is something like 30 separate precincting systems, or 32, aren't there, Judge Kenny, [502] in the county?

Mr. Kenny: Yes. Of course what the doctor would do is not use the numbers of the registrar of voters, he would renumber them because there are various precinct sheets. In other words, you would have to renumber them.

The Court: You would have to renumber all precincts in the county?

The Witness: No, it doesn't matter.

Mr. Kenny: I might say, I have done that in taking straw votes, which have always given pretty bad results for me too, but I have done that. That is, you take 5000 precincts and in order to get what you want you don't use the registrar's numbers because you keep running into Santa Monica, or Placentia which have their own numbers.

The Court: You mean you didn't do that?

The Witness: The point is now —

The Court: In the city of Los Angeles?

The Witness: May I ask a question?

The Court: Yes.

(Testimony of William S. Robinson.)

The Witness: These precincts are numbered according to geographic regions, is that correct? That is, the 1000s are somewhere in the city?

The Court: There is about 3300 in the city, and they are numbered. They start out originally, I think, numbering them at the City Hall but now they skip all over. Every time [503] they add a section to the city, no matter where it is, why those precincts are added.

The Witness: As long as there are no precincts with no duplications in the numbers given the different precincts, they can be numbered any way you like.

The Court: They are indicated, for instance in Long Beach they begin with Long Beach Precinct No. 1 and go on up to whatever it is. I think it is probably about 200. Then there is Placentia Precinct 1 to 13.

The Witness: Then the 5000 precincts would have to be numbered consecutively and whatever order was convenient from 1 to 5000.

The Court: Let's say you have 32 given precincting systems.

The Witness: You might select randomly one of the 32 to begin with and keep the names within the precincts which you get.

The Court: Then you would take three random tables, let's say?

The Witness: That is not necessary. I would sooner number the 5000 precincts in any order whatever and that would give me a lot of time.

(Testimony of William S. Robinson.)

The Court: Wouldn't you need a lot of clerical help?

The Witness: I have numbered more than 5000 names without any clerical help and given lectures as well. [504]

The Court: You are a remarkable person. The clerk, however, has a lot of work to do besides this.

The Witness: There are numbering machines which will stamp them for you automatically as far as you can stamp them, I would say, roughly 20 to 30 a minute.

The Court: Well, then, you don't have any suggestion concerning this unless the precincts are renumbered? That is the essence of your testimony?

The Witness: No, I have if the precincts are not renumbered, but it would be inefficient to do it that way.

The Court: It would be inefficient?

The Witness: That is right, to select, let's say, the cities or incorporated places, whatever they are, Long Beach, Placentia, select them at random and number them from 1 to 33. I would select first from those general regions randomly to number them, then select randomly a precinct from the region selected, and then select randomly the name from the precinct within the region selected. That is laborious with renumbering the precincts.

Q. (By Mr. Margolis): You mean renumbering is the efficient way, the other way is not efficient?

(Testimony of William S. Robinson.)

A. That is correct.

Q. And the result is just as good one way as the other? [505]

A. That is correct.

Q. Let's see if we can get this straight, Doctor. You would number the precincts?

A. With a \$2.50 numbering machine.

Q. And then——

The Court: Did you ever try to get one from a department of the government?

The Witness: I never have. I don't even own one myself, as far as that goes. I use a pen.

Q. (By Mr. Margolis): You would number them either with a \$2.50 numbering machine of a 2½-cent post office pad? A. Right.

Q. After they were numbered, you would then use your random tables of numbers for the purpose of securing precincts?

A. At random.

The Court: This is one random table?

The Witness: That is correct.

Q. (By Mr. Margolis): Then you would use the——

A. I might use the next three digits in the same random table for selecting within the precinct. I only need one table.

Q. It wouldn't make any difference? [506]

A. It wouldn't make any difference.

The Court: This is one table?

The Witness: This is one page from a table. It is not one page from a table, it is one mimeo-

(Testimony of William S. Robinson.)

graphed sheet which is really, I should say, slightly over half of one page of a published table of random numbers.

The Court: Could you use this one sheet and still get a random selection?

The Witness: I might run out of that one sheet, but for two shillings—whatever that would amount to in American money—you can buy 10,000 random digits which are quite adequate for your purpose.

Q. (By Mr. Margolis): Doctor, I would like to get at this. That is one method you have described. Let us assume that you want to get 1000 names. You know in advance that the number of names you want to get is 1000. Would there be any system available without use of the random tables, such as taking precincts in a certain order and names on those precincts in a certain order which would be satisfactory?

A. It would be difficult to do, laborious, I should say to do, unless you ultimately intended to exhaust the population, as they do. I understand, in the Superior Court. That is, unless you intended to adopt a rotational system so that ultimately in every 10 or 20 years you get in the whole [507] group. It could be done, but it would be more laborious than the method I propose.

Q. But you could take, for instance—

A. You could take every 20th name or every 900th name, but that requires counting. If you don't introduce the random element, the only other way of taking a fair sample is to take every n th

(Testimony of William S. Robinson.)

name. It doesn't matter how the names are numbered to start with, if you take every nth name you would get a fair sample, but you have to count to get the nth name.

Q. Could you take every 9th name and every 5th precinct.

A. Yes. That is equivalent to it, but then you have to take, if you start with 1, 10, 19, the next year you have to start with 2, 11, 20, or you are going to get into trouble.

Q. The numbers that are selected must vary from year to year?

A. Systematically clear throughout the whole range of names, or else you must introduce a random element, one or the other.

The Court: I should say, counsel, having had some experience in government offices, that it would be practically impossible to get the administrative offices of the United States courts to finance the method used by the county, circulating all 5000 precincts here to get a name from each one.

On the random table method, I would like to pursue that [508] a little further, if I may, without interrupting your line of thought.

You heard the testimony here that the terms of court, so-called, are six months, that every six months new names go into the master box. It has to be a new list of available names.

The Witness: I understand.

The Court: At least every six months.

The Witness: Yes.

(Testimony of William S. Robinson.)

The Court: You would use one random table and then what would you do on the next six months, use another table?

The Witness: Or read the numbers backwards, or take the second, third and fourth and fifth digits instead of the first, second, third and fourth; or I would read the numbers diagonally.

The Court: Just with one table?

The Witness: Yes. That is a rather small table to do it with, but one complete table is all that is required.

The Court: Will you produce one at the noon hour?

Mr. Margolis: Do you have it in your car?

The Witness: I am not sure, but I think I have. Otherwise it is at home. Well, at noon I can produce it anyway, I guess.

Mr. Margolis: If we had two shillings, could we buy one from you? [509]

The Witness: I don't think it is available in Los Angeles. In New York you can get it at the McMillan Company, if they happen to have it in. But it is photostated very admirably and very easily.

The Court: You mean they charge two shillings to look at this?

The Witness: I mean that the booklet costs two shillings. It is one of the University of London's tracts for computers. [510]

(Testimony of William S. Robinson.)

Q. (By Mr. Margolis): Now, Dr. Robinson, another source that was used, according to the testimony of Mr. Brown, were clubs, among which were the Friday Morning Club, the Ebell Club, and Los Angeles Country Club, the California Club and the Parent-Teachers Congress. What is your opinion as to the possibility of obtaining any kind of a fair cross-section as a result of the use of such lists?

A. Such a list will not give a fair cross-section.

Q. Why?

A. All you need to do, the only club in that list that I know is the Ebell Club, but if you will look at the automobiles surrounding the Ebell Club some morning, or some afternoon, you will see that that list is upward by itself economically considerably more than, say, the registration for all automobiles. You will find no Model T Fords among them.

The Court: You mean you look at that when a meeting is in session?

The Witness: That is true.

The Court: The Ebell Club is rented for lectures. [511]

The Witness: If you make sure of the fact that the Ebell Club members are parked outside. It is a well-known fact and I think requires, in fact I think it was brought out very plainly in the examination of Mr. Brown himself, that those clubs, or the membership of those clubs, is in the higher economic levels. There is certainly adequate evidence upon that fact published in scientific journals.

(Testimony of William S. Robinson.)

Q. (By Mr. Margolis): Now another source is this blue book, which is in evidence as Defendants' Exhibit U. You might take a look at it, Doctor, and tell us, could we get a fair cross-section by taking, let's say, 1500 names out of that book?

Mr. Calverley: Your Honor, I don't like to object to this line of questioning—it is very interesting—but the witness is testifying to matters here upon which no foundation whatever has been laid.

The Court: No, there isn't any foundation laid.

Mr. Calverley: He is just giving offhand opinions as to whether or not these sources are representative, just based upon his ideas about it. We object to it on that ground.

Mr. Margolis: He is an expert.

The Court: I have let all the rest of it in, I might as well let the blue book in.

Mr. Margolis: The blue book is in evidence.

The Court: I mean his opinion on the blue book.

Mr. Margolis: I don't know what additional foundation your Honor thinks is necessary.

The Court: I should think that in order to be able to testify he should know more than he knows, because the witness hasn't shown that he has had any mathematical sampling formula in relation to the blue book or the Ebell Club or the Friday Morning Club.

Q. (By Mr. Margolis): Let me put the question this way: With your knowledge of sampling and statistical methods and through an examination of that blue book, which is in evidence as De-

(Testimony of William S. Robinson.)

endants' Exhibit U, can you state whether or not it will be possible to get a fair cross-section from that blue book by taking names at random, or any other way, from it?

Mr. Calverley: Same objection, your Honor. He has made no examination of this book itself.

Mr. Margolis: He is examining it now.

The Court: I don't know how he can tell by looking at that book what the background of the people is.

Q. (By Mr. Margolis): Let me ask this question: Can you tell by examining the book, Doctor, whether you can get a fair cross-section from it?

A. I cannot, not by examining the book.

Q. Can you tell by any other method?

A. I am somewhat puzzled as to whether or not I should volunteer information or not.

The Court: You have been doing a pretty good job at it so far.

The Witness: Anything that I have said—let's put it this way—I can document very thoroughly from undisputable scientific sources that fact. What I was going to do was to comment on this book by saying, if you will read an article in the American Sociological Review by Frederick F. Steffan, called "Practical Problems in Sampling Procedure"—and Dr. Steffan happens to be a consultant to the census department, and he designed the sampling scheme for the 1940 census for getting additional questions—you will find there a list of what are called "red flags," things never to take samples from, and they are telephone books, city directories,

(Testimony of William S. Robinson.)

blue books, Who's Who, and there is a long list of them. Now that is an established available scientific reputable information. I happen to be basing my answers upon that fact and that knowledge. It is not hearsay, it is not any personal opinion. Anything I say I can document and I can prove anywhere that you want to prove it on a scientific ground.

Now if you want those references or if you want me to bring them in, I have reprints of them in my files, and I will be happy to do so. But I am not giving you opinions, I am giving you what any competent, social, scientific man [514] would agree with.

The Court: And you say you think the competence of every social scientist can be established?

The Witness: Yes.

The Court: Do you accept the witness' statement, counsel, now or are you offering him as an expert witness yet?

Mr. Margolis: I am offering the testimony as it stands.

The Court: You are offering him as an expert witness.

Mr. Margolis: Yes. I am offering him as an expert witness.

The Court: As an expert witness?

Mr. Margolis: Of course, your Honor.

I want to say this, I think it is a little bit farcical to trace this question of what a blue book is. I think it is a matter of common knowledge what a blue book is.

(Testimony of William S. Robinson.)

The Court: I have a blue book at home, which is a roster, and which is called a blue book. It was a list of officials. That is what I thought you were referring to originally when you said the South-west Blue Book.

Mr. Margolis: The term "blue book" I think is commonly known and also used in connection with social registers. If this is that type of a blue book it can easily be ascertained by examining the blue book.

The Court: Yes, I read the preface. [515]

* * *

Mr. Margolis: You will find also at the back of this book what is known as a club register.

The Court: Yet me see the book a moment, will you please?

(The volume referred to was passed to the Court.)

Mr. Margolis: It starts at page—I was going to indicate the page at which it starts for the purpose of the record. [516]

The Court: I don't see any occupations indicated here at all except where somebody, for instance I notice somebody is a lieutenant, and I notice that he was given here as a junior, but the rest of them do not seem to have any occupations at all. They give their children's names and the clubs they belong to.

Mr. Margolis: I think if it cannot be concluded from that, that it is a social register of the people

(Testimony of William S. Robinson.)

in the higher economic levels, then we are just not people with common, ordinary intelligence, it seems to me.

The Court: That is what it says it is, a social register.

Mr. Margolis: Of course, your Honor. And also if you will look at the names and addresses of the clubs to which they belong, we just have to be blind to reach any other result, it seems to me, your Honor. I think this has reached a rather ridiculous extreme when there is any contention being made that that can possibly constitute a cross-section.

The Court: I don't know that anybody contended that it constituted a cross-section.

Mr. Margolis: That is all I am trying to get out of this witness as an expert, is that it does not, and I think that there is a reasonable basis for it, and to object that there be no reasonable basis for it, I think is just to blind [517] oneself to fact and say, "I don't want to see. I don't want to know what is going on."

The Court: Are you suggesting that that is my attitude, counsel?

Mr. Margolis: No. I am addressing myself to the objection. There has been an objection, and I think I have a right to address myself to the objection, and the objection is on the basis that I say, which is the type of objection which says, "We don't want to know the facts, we don't want the facts in the record." That is the level of the objection.

(Testimony of William S. Robinson.)

The Court: This is in the record. This book is in the record and it speaks for itself.

Mr. Margolis: I am talking about the objection.

The Court: Let me ask the witness, did you ever see this book before?

The Witness: I consulted it the other day after it was here.

The Court: After it was here?

The Witness: Yes. I am happy to add that I am not in it.

The Court: You are no doubt discriminated against.

The Witness: Undoubtedly.

The Court: Did you ever consult the publisher, Lenora King Berry?

The Witness: I did not. [518]

The Court: Can you tell by looking at this book the occupations of any of these people?

The Witness: I cannot. I could estimate their relative incomes in comparison with that of the average for the country.

The Court: Here is a page—I don't know whether it is at random or not, but I just happened to have it open—it says: "Deborah Coulter Sedgwick (Junior)." Can you tell what her occupation is?

The Witness: I cannot.

The Court: There are no clubs listed, nothing at all except Deborah Coulter Sedgwick Jr., 2203 Seventeenth Street, Bakersfield; telephone 2-8483. Now can you tell by looking at that name anything about that person's economic class, status, age?

(Testimony of William S. Robinson.)

The Witness: I can tell by looking at her name and the fact that it is in this book that her average income is larger than the average income in the United States.

The Court: You can tell that?

The Witness: You bet!

The Court: Are all your opinions as you have expressed them here based upon the same methods that you have reached that opinion?

The Witness: They are not.

The Court: They are not? [519]

The Witness: No.

The Court: I will sustain the objection and strike his testimony concerning the Friday Morning Club, the Ebell Club and the other club, whatever it was.

Mr. Calverley: The University Club I think was mentioned.

The Court: I do not think he mentioned that just recently.

Mr. Calverley: The Los Angeles Country Club, I believe it was.

Mr. Garrett: There is testimony, I think, your Honor, related to the Ebell Club.

The Court: The Ebell Club and the Friday Morning Club.

Mr. Margolis: I trust that some evidence will be offered about the laborers that belong to these clubs and the operatives that belong to them and who are in the blue book.

(Testimony of William S. Robinson.)

The Court: If you are trying the people in the blue book, that is one thing, counsel; if this is an inquiry to ascertain whether or not the clerk and the commissioner of this court endeavor to secure an impartial jury, or used methods which were not designed to discriminate against any class, that is quite another thing.

Mr. Margolis: Our point is this—I tried to make it clear; I want to make it clear again—we are not concerned with motive, we are not concerned with specific intent; we [520] are concerned with the use of a method which is designed to achieve a particular result, and any time that that method is used, it is our contention that if that method is designed as one which will lead to a particular result which is not a cross-section then that method is to be condemned.

Mr. Calverley: If the Court please, on that point I want to make this brief statement in support of the objection to this witness' testimony. Apparently that statement of counsel is based upon the Thiel case, which is the only case that discusses discrimination as to prospective jurors on the basis of their economic status as distinguished from race and sex. I am reading from page 220 of the opinion, which is in Volume 328 U. S.:

“The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of

(Testimony of William S. Robinson.)

the community (citing *Smith v Texas, Glasser v United States*). This doesn't mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community. Frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional [521] exclusion of any of those groups."

I point out, your Honor, that that is in the conjunctive, not the disjunctive. It must be that the discrimination is systematic and intentional, and there is no evidence in this record whatever of any intentional exclusion of any of the groups mentioned by the court.

The Court: Of course counsel will say that the method followed is bound to result in discrimination and exclusion.

Mr. Margolis: Let me say this, your Honor: I just want to at this point reply very briefly and suggest that the word "intentional" has several different meanings, including specific intent and general intent. I think that a lawyer ought to understand that. Also the rest of the case has to be read and the other cases that have been cited have to be read to understand in what sense the word "intentional" is used. I think that I will be able to demonstrate to the Court the sense in which it is used.

The Court: We will get to that point pretty soon, I assume.

(Testimony of William S. Robinson.)

Upon thinking a little bit further about this, I think perhaps this goes to the weight of this witness' testimony and all of his testimony. If you still insist upon having him express his opinion concerning this book, I will admit it, but I want to say to you now that it goes to the weight of his testimony and the entire testimony that he has given [522] in this case. If he has no better foundation for the conclusions that he is about to express, or you have asked him to express concerning this book, if he has no better foundation for the conclusions that he expressed otherwise, and you want him to assume that responsibility, I will admit it, counsel.

Mr. Margolis: I do not think that is a fair question. That is like asking, have you stopped beating your wife. I do not concede that I have been beating my wife. I do not concede, your Honor, that this testimony is to any extent limited. I do offer it but not with the limitation which your Honor imposes upon it.

The Court: I am saying that if you offer it I will admit it, but I am stating to you that I will receive it and it will go to the weight of his testimony.

Mr. Margolis: I want to say this again: The testimony was originally offered, and the offer still stands, and of course if your Honor wishes to limit it I cannot control the manner in which your Honor construes the weight he gives to the testimony, but I certainly do not agree to the limitation or the approach which your Honor takes. I simply make

(Testimony of William S. Robinson.)

an offer of that testimony just as it was made originally. I do not think that it is fair to place me in the position of saying, if you offer that testimony then I am going to do so-and-so.

The Court: I am not saying that. I am saying that I will receive it on that basis.

Mr. Margolis: I will certainly not offer it on that basis.

The Court: Pardon me, counsel. I have been endeavoring to follow this witness' testimony very, very closely for the two days that it has been given in the hope and expectation that I would receive something that would aid me in determining the immediate question and would also be of some guide in the matter of selecting juries. But here he says that he doesn't know anything about it and he can tell by merely looking at a name in a book what that person's economic status is.

Mr. Margolis: Let me ask your Honor this: I assume if you read a name in a book of Government employees that it will be possible to tell something about that person's earnings, is that correct, your Honor, because a person who is working for the Government, with the exception of one man doesn't make \$100,000 a year. You would learn something from the fact that that person's name, with respect to his earnings, was in that kind of a book.

The Court: I wouldn't be able to learn from reading his name in a book that he was in a different economic class or his income was on a higher economic level than fishermen.

(Testimony of William S. Robinson.)

Mr. Margolis: You would be able to tell what his earnings were within certain ranges. What this witness has said is that it has been scientifically demonstrated that the [524] presence of persons' names in social registers has a direct relationship to their income, that people don't get into the social registers if they make \$20 a week, for example. There are many people in the United States who make \$20 or \$25 or \$30 a week, but those people are not in social registers.

I think not only is the testimony proper and correct, but that any other conclusion is simply inescapable. I think any other conclusion is one which simply cannot be accepted. To think that anybody would get up before your Honor and say that in social registers people who make \$25 a week and who are drawing \$25 a week unemployment insurance are to be found, I think your Honor would find that statement pretty ridiculous, and it would be ridiculous.

The Court: Let's see. The basis of your argument is that the inclusion in here is the excusion of other classes, is that right?

Mr. Margolis: The inclusion in here is of a limited type of persons in the community, persons who within the cross-section might be perfectly competent and impartial jurors, but who when they are selected in a discriminatory manner do not give the kind of an impartial cross-section of the jury panel which is required. That is our contention. And I say again that for anybody even to think for a sec-

(Testimony of William S. Robinson.)

and that an unemployed person, that a worker, that a janitor, that for example a colored janitor down here in of these [526] buildings, is in that blue book is just ridiculous.

The Court: Has anybody said that?

Mr. Margolis: But what this witness has testified to is precisely along those lines. If your Honor agrees with my statement on the point, then I do not see how you can reach a conclusion that the witness' testimony is as ridiculous as your Honor apparently thinks it is. If your Honor agrees with me that it would be absolutely ridiculous for anybody to stand here and say that people who make \$20 a week are in that blue book, if your Honor agrees with that, then the witness is of course correct.

The Court: I haven't given any such indication at all, counsel.

Mr. Margolis: Of course you haven't. Then your Honor wouldn't do it.

The Court: I have indicated to you that I doubt this witness' ability to read a name, or her name, in a book with nothing but a name and address and the fact that they live in Bakersfield and have a telephone number, that he can state what economic class they are in.

Mr. Margolis: He can state. What the witness testified to was that he could state within what range of income they fell, that they fell above a certain range of income.

For example, all the witness would have to say would be that I am sure that that person is a mem-

(Testimony of William S. Robinson.)

ber of a family which [526] has an income of more than \$25 a week, and that would be completely consistent with the answer which he gave. There are people who do not have an income of \$25 a week, and I know many of them.

The Court: Counsel, this book is published in Los Angeles, at 3418 North Broadway, Los Angeles. I suppose that you could probably get the publisher of the book here and find out just how the people got in here. But I do not know that it is that important because the total number of names that went out of this book was 1680.

Mr. Margolis: That is of the names for which we have lists. There is also some testimony that the blue book may have been used earlier.

The Court: A number of years ago, and that he only got a few hundred names from it. There are 1680 names—say he got 400 at that time; that would be 2000 names—and according to the clerk's testimony they have all flowed back into the available file, that is, in something like 25,000 names.

Mr. Margolis: That is 1/12 to start with, just taking that figure.

The Court: 2000 is one-twelfth of 25,000?

Mr. Margolis: It is approximately one-twelfth, your Honor.

The Court: We will recess until 2:00 o'clock.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p.m. of the same date.) [527]

(Testimony of William S. Robinson.)

Los Angeles, California, February 21, 1947;

2:00 o'Clock p.m.

The Court: Ex parte matters?

The Clerk: None, your Honor.

The Court: U. S. v Local 36.

Usual stipulation?

Mr. Margolis: Yes, your Honor.

Mr. Calverley: So stipulated.

The Court: Very well, Dr. Robinson was on the stand.

WILLIAM S. ROBINSON

the witness on the stand at the time of recess, resumed the stand and testified further as follows:

Direct Examination

(Continued)

By Mr. Margolis:

Q. Doctor, I think before the recess there had been some mention of the name of Sedgwick, Deborah Coulter Sedgwick (Junor), which appears on page 304 of Defendants' Exhibit U. Aside from your general knowledge of what is contained in these books and the scientific studies that have been made of them, is there any internal evidence in the book which confirms your conclusion as the economic status of that person?

A. There is. Deborah Coulter Sedgwick's maiden name is given as Coulter, and if you will look, in the book under Coulter, on page 83, you will

(Testimony of William S. Robinson.)

find Coulter, Mr. and Mrs. Joel [528] Wright, and listed as living at the same address as Deborah Coulter Sedgwick, and you will find slightly lower on the page this notation: "Country residence: Coulter Ranch, Route 3, Box 714, Bakersfield.

In other words, these people, who all live at the same place, live in Bakersfield but they have a country residence as well.

The Court: That wasn't known to you when you answered the question before the noon recess, was it?

The Witness: That was not.

Mr. Margolis: I asked whether there was anything confirming it.

Mr. Calverley: I move to strike the answer on the ground that there is no foundation laid because that doesn't indicate that those people own that ranch or that this particular Deborah Coulter Sedgwick has any interest in it.

Q. (By Mr. Margolis): Is there any indication of ownership on this? A. Not on this.

Q. Did you obtain any information on that subject?

A. I did.

Q. What did you obtain?

A. I went to the public library and consulted the Bakersfield city directory.

Q. What did you find? [529]

A. It stated that Joel Wright Coulter is a rancher, owns a ranch.

The Court: That is to say, he owns a ranch or he is a rancher?

(Testimony of William S. Robinson.)

The Witness: It says ranch owner. And it says furthermore that he is a householder and owns this property at 2203 Seventeenth Street.

The Court: Do you know whether his farm is a large farm or just a potato patch?

The Witness: It means that she lives at the same place.

Mr. Calverley: Does it mean she owns any interest in it?

The Witness: Not at all.

Mr. Calverley: Then I move to strike the answer.

The Court: I will let the answer go in as his opinion.

Q. (By Mr. Margolis): Will you finish your answer? What does it mean?

A. It means to me that this is a person who is a rancher, but not a dirt rancher, certainly, as he lives in town, and I don't think he commutes to his ranch by subway so he must own an automobile capable of getting him there and back. In other words, the usual rancher does not live in town.

Q. He usually lives at the place where he works?

A. Yes.

There is a small bit of additional evidence—it would have to be verified but at least there are some probabilities [530] connected with it—the address is 2203 Seventeenth Street, which to me indicates that it is probably a corner house and corner houses are known to be considerably more expensive than that houses next door or in the center of the block.

The Court: Where?

(Testimony of William S. Robinson.)

The Witness: In any city. And if you want references again I will give them to you. Any method of selecting a sample of houses which gets corner houses more often is biased upward economically than those that are not corner houses.

The Court: Do you know where Seventeenth Street is in Bakersfield?

The Witness: I haven't the slightest idea, but as I said there are probabilities—and this would have to be verified, but I understand that in numbering houses in California you start the new hundreds at every street.

The Court: But you don't know where Seventeenth Street is?

The Witness: I haven't the slightest idea.

The Court: You don't know what the 2200 block would be like, whether or not that is over around in the manufacturing section or out towards the county hospital in Bakersfield?

The Witness: I haven't the slightest idea.

The Court: Or out in the oil fields?

The Witness: It might be, I suppose. [531]

The Court: Do you know what kind of a ranch they own?

The Witness: Not the slightest.

The Court: Do you know about the ranches in Bakersfield?

The Witness: I know that they can afford to own this house in town while operating a ranch. I know that that is highly unusual.

The Court: The wife couldn't be a school teacher and have to be in town?

(Testimony of William S. Robinson.)

The Witness: She would still belong to this family and I think this a high economic class family, and I think their attitudes would be the attitudes of the upper economic brackets.

The Court: Have you any way of telling whether or not the man of the house had ever worked as ranch hand, maybe saved his money and bought a farm?

The Witness: No, I haven't.

The Court: Do you think that that would affect his attitude or his capacity to be an impartial juror?

The Witness: We have gone into this before, and I don't think that it would affect his capacity to be an impartial juror. But I merely was able to put him more or less, at least to my satisfaction and with the classification which I have already given, in an economic class and that economic class is not, let's say, the lower third in the nation.

Q. (By Mr. Margolis): By the way, do you have any figures on the average income in the nation?

A. The average income for the nation, the median income, which is the proper average to use in the circumstances, has fluctuated but it is roughly \$1500 a year, which is roughly \$30 a week.

Q. What do you mean by median income as distinguished from average?

A. Half of the people have higher incomes than the medium income and half the people have lower incomes than the median income.

(Testimony of William S. Robinson.)

The Court: How can you tell that that is her maiden name? Can you tell that by looking in the back of the other Coulters?

A. I can tell by looking at the Coulter above and verifying the fact completely without question by finding if she is listed under Coulter in the front of the book as well. It was a guess, but you follow up guesses to get information.

Mr. Calverley: There is no indication, your Honor, that the ranch is or is not mortgaged.

The Witness: There is no indication whatever. Could I possibly claiming whether I know it is mortgaged or not?

Mr. Calverley: Yes, I think you could.

The Court: I think you are when you say that she is in [533] the upper economic group.

Q. By Mr. Margolis): Do you think that the poor farmer—let me ask you this—from a statistical standpoint, is there any reasonable probability that a poor farmer with a heavily mortgaged ranch maintains a city residence?

A. There is very small probability. I think any normal person would think there is a small probability that that is true.

Mr. Margolis: At this time, your Honor, I have here some records which we have received from the Registrar of Voters, giving Los Angeles city precincts and the Los Angeles county precincts, and I ask that they be marked in evidence.

(Testimony of William S. Robinson.)

The Court: Los Angeles County precincts is the subdivision. Yes. These will be marked in evidence.

Mr. Margolis: These figures on here I don't know what they mean.

The Court: Apparently somebody has revised them to February 10, 1947.

Mr. Margolis: Yes. We were informed by the city registrar that that is up to date as of February 10, 1947, and the revisions brought them up to date from formerly November [534] 1946. The changes are between November 1946 and February 1947.

The Court: Very well. Received in evidence.

The Clerk: JJ and KK in evidence.

Mr. Margolis: Which one is JJ, for the record?

The Clerk: Los Angeles city precincts is JJ; Los Angeles County precincts is KK.

(The documents referred to were received in evidence and marked Defendants' Exhibits JJ and KK respectively).

* * *

Q. (By Mr. Margolis): Dr. Robinson, I think we were discussing also this morning the question of numbering these precincts so that a selection could properly be made from them. With those lists in front of you, do you have any additional comments to make on that subject?

A. Yes. I think I might complete the numbering in at most an hour by myself with a pen.

Q. Will you tell us what method you would use?

(Testimony of William S. Robinson.)

A. Yes. The city precincts are numbered there.

The Court: You would just number that sheet there?

The Witness: I am sorry, I would not number the sheet.

The Court: You are speaking now in your answer of numbering these?

The Witness: Of numbering the precincts.

The Court: These big sheets here?

The Witness: No, I am talking about getting numbers for the different precincts from this.

If you will let me go on I think it will clarify itself.

The Court: All right.

The Witness: The city precincts are numbered from 1 to 3024, and with one exception, one qualification which I will come to in a moment, I would simply let those precincts stand as they are with their printed number.

The Court: I understand. If you are speaking about just giving a number to lists of precinct numbers on a sheet, that is quite a different proposition.

The Witness: That is all that is involved.

The Court: And number these big sheets here, of which there are 5894.

Q. (By Mr. Margolis): The numbers could be placed opposite these numbers and then you would have a reference? [536]

A. You would have a dictionary. The A's would have to be numbered individually because there are 9 A's, so let the numbers stand but the A's would have to be renumbered.

(Testimony of William S. Robinson.)

I would number these, and there are simple ways of doing this, so I would number the precincts.

The precincts could then be selected at random from a table of random numbers. I brought a copy of a table of random numbers with me which I brought from my home, which is approximately north of Pico and east of Sepulveda.

There are two stages in the proceedings that I envision. The first consists in picking, let's say, as many precincts as there are persons needed. You say that is roughly of the order of a thousand. Well, I would pick 1000 precincts from this list, using my random numbers, and this list would also serve as a dictionary telling me what precincts in Los Angeles city and in Los Angeles County to look at in that big book of sheets.

Then with a small sheet of random numbers in one hand I could very readily, using some kind of, say, manufactured key to put over the sheets that would number them automatically, they are spaced at equal intervals, I could then select randomly within each precinct one person.

That is all there is to it.

The Court: This sheet of random numbers, Exhibit V, that you put in evidence, I took it during the noon recess [537] and tried to work out some process, but how can there be any assurance that you will have in this table of random numbers—you would use all of these tables? You have 26 here.

(Testimony of William S. Robinson.)

The Witness: I would use one with four digits, unless there were repetitions of numbers in the set, and then you can either throw out the repetition or use it as you like.

The Court: How would you be sure that you would have a representation of all numbers less than 5894?

The Witness: Because I should have randomly picked from that list of numbers under 5000, and whatever it is. It is the randomness which insures the representativeness. In fact, it is the randomness which appears to me to be the definition of fairness in picking. Certainly it is the randomness which is the fairness in picking the jurors from the wheels.

The Court: And that method of randomness which you use in making surveys of public opinion?

The Witness: Quite so.

Q. (By Mr. Margolis): Now there is one other factor that I would like to ask you about——

The Court: By the way, that book you have there, for the purpose of the record, what is the title of it? Who is it published by?

The Witness: My random numbers? [538]

The Court: Yes.

The Witness: It is "Random Sampling Numbers," arranged by L. H. C. Trippett, Master of Science. It is a tract for computers, No. 15, published by the Department of Applied Statistics of the University of London, University College, Cambridge University Press, 1927.

(Testimony of William S. Robinson.)

Q. (By Mr. Margolis): As I started to say, Doctor, there is one other factor that I wanted to ask you about in connection with the method of obtaining prospective jurors that the testimony shows has been used. The testimony shows that a number of questionnaires are sent out and that only part of those that are sent out are returned, and that there is no follow-up as to the questionnaires which are sent out but which weren't returned. One example that was given was that somewhere between 5000 and 6000 questionnaires were sent out and that of these 1800 were returned.

Even assuming that the original 5000 or 6000 questionnaires which were sent out were to persons selected in a perfectly scientific way to obtain a cross-section of the community, what would be the effect, in your opinion, of using just those that are returned without any follow-up on those that are not returned?

A. The fact would be to introduce a bias.

Q. Could you explain that and state upon what you base that? [539]

The Court: You mean a statistical bias?

The Witness: Lack of representativeness in the sample.

Q. (By Mr. Margolis): Will you say why, and state the basis upon which your conclusion is reached?

A. The basis upon which my conclusion is reached is a large number of studies, some of them conducted under my direction, all scientifically rep-

(Testimony of William S. Robinson.)

utable and, let's say, varifiable. A number of such studies were conducted by me at the Office of Radio Research in New York.

Q. What did these studies show?

A. They show that when you send out questionnaires in general if you don't follow up you get roughly one-third of your questionnaires back. What was the figure that was given here?

Q. 1800 out of 5000 or 6000.

The Court: You say when you don't send out questionnaires?

The Witness: When you send out questionnaires but you don't send follow-ups.

1800 out of how many, Mr. Margolis?

Mr. Margolis: Between 5000 and 6000.

The Witness: That is a third. Roughly you get a third back, and the third that you get back are biased economically. [540]

Q. (By Mr. Margolis): In what way?

A. They are not so much biased upwards and downwards or in the average as they are in being biased in coming solely or in the main from the group of proprietors, managers, and officials. They come also from clerical, sales and kindred persons, but they do not come from professional people ordinarily, they are under-represented in professional people, and they are greatly underrepresented in those lower on the scale than clerical. Craftsmen, foremen, domestic services, operatives and protective services are greatly underrated in questionnaire returns.

(Testimony of William S. Robinson.)

The Court: You are speaking generally now or of this particular sample?

The Witness: I am speaking generally. It has been done—I suppose studies of this sort have been made 40 or 50 times and the result has never failed to be forthcoming yet.

The Court: In other words, whether you are sending out 5000 questionnaires concerning soap, for example?

The Witness: Well, they sent out questionnaires on soap but I don't remember having done it myself.

The Court: You spoke about, when you were being qualified here, about sampling something for Du Pont. What was that, soap? [541]

The Witness: No. I was not sampling, in the first place; I was devising an experimental design.

The Court: What was it for?

The Witness: I did not send out any questionnaires.

The Court: What was it, soap?

The Witness: Women's slips, I think.

The Court: All right. Now if you had sent out 5000 questionnaires concerning women's slips, then you would get one-third back?

The Witness: Roughly, or you would probably get back fewer than that in that particular case.

The Court: In that particular case?

The Witness: Women do not respond as well as men, in other words.

(Testimony of William S. Robinson.)

The Court: Let us take something else. Let us take something that more men and women are interested in.

Mr. Margolis: Cigarettes?

The Court: There isn't a universal demand for cigarettes.

The Witness: Why don't you take something where you would tend to get a large return?

The Court: You name it.

The Witness: Suppose you are conducting a survey of opinion. People always like to give their opinions and there is a natural tendency to send their questionnaires back. [542]

The Court: I don't know. A lot of people might not want to express an opinion, or they might be so biased—there are a lot of things that prevent them from expressing an opinion if they might want to buy something.

The Witness: Biased persons always send back the questionnaires.

The Court: Let's take clothing.

The Witness: All right.

The Court: That is, whether people like wool or cotton clothing. Assume that you send out a questionnaire, and that that was the question you asked, do you like wool or cotton clothes, or shoes, to 5000 persons, your experience shows that you would get back a third.

The Witness: I doubt—I am not quibbling, but I would like to know whether that is all you want

(Testimony of William S. Robinson.)

on the questionnaire, or whether you are going to sell the questionnaire with a preamble and a reason for asking it, and so forth.

The Court: What would you suggest?

The Witness: There is a technique as to designing questionnaires.

The Court: I know, but in this questionnaire here they are just sent out stating that your name has been selected for jury service, that is all. Suppose you do not say anything else but that you have been picked as a person to express your opinion as to whether or not wool or cotton is [543] best suited to make clothing out of.

The Witness: You will get 25 or maybe 30 per cent. if you are lucky.

The Court: That is, you would get back less than a third, in your judgment?

The Witness: That is right.

The Court: And of that one-third they would be divided into the 1940 census, into the 11 classifications, they would come back about how? Would you state that again, please?

The Witness: They would come back, you would have extremely few professionals or wives of professionals answering your questionnaire. Assuming that you had sent them out in the correct proportions.

The Court: All right. It was a random selection.

The Witness: All right. Then the answers of professional people—well, I will put it in this way:

(Testimony of William S. Robinson.)

Those professional people who get the questionnaire would tend not to return it. Those business people who get the questionnaire would be more likely to return it, and a larger percentage of them would return it, a more large percentage.

Clerical people who get it, a smaller percentage would return it, but still larger than professional.

But you would be surprised how remarkably it comes out. Laboring people to whom you send it would almost never return it. Machine operators, domestic service workers, they would return it rather sparsely. [544]

The Court: Craftsmen, foremen and kindred workers, would they return it?

The Witness? Not as well as clerical and sales.

The Court: Operatives and kindred workers?

The Witness: About as well as craftsmen.

The Court: Domestic workers?

The Witness: Less able.

The Court: Protective and service workers?

The Witness: Policemen, they are so few it makes no difference anyway.

The Court: Service workers, domestic and protective?

The Witness: All right. Service workers all told, domestic and protective would tend not to return it. Domestics don't.

The Court: I am just reading your headings here.

The Witness: All right.

The Court: Farm laborers.

(Testimony of William S. Robinson.)

The Witness: Farm laborers would almost not at all. In fact, you wouldn't be able to get the questionnaire to them. They are itinerant in the main.

The Court: Laborers exclusive of farm?

The Witness: They would return it very sparsely, even if you would get the questionnaires to them.

The Court: In about the same proportion, would you say, [545] as the 1800 came back here in the 5000 questionnaires that were sent to the jury?

The Witness: No, I don't mean that all of these groups would return it; roughly one-third of the questionnaires would be returned. I don't mean of professional people that one-third would send the questionnaires back or one-third of the domestics.

The Court: I understand.

The Witness: But all told about one-third would send them back, and that one-third would be mostly from the clerical and sales workers, proprietors, managers and officials.

The Court: So that assume that the 5000 names which you picked on this wool and cotton question were selected randomly, when you finally got your questionnaires back to tabulate them you would have a large percentage of the classes you have indicated?

The Witness: A larger percentage of proprietors, managers and officials, and probably also of clerical and sales.

The Court: That might account, might it not, for some of the discrepancies in your final figures

(Testimony of William S. Robinson.)

here on these questionnaires in connection with the jury, wouldn't it?

The Witness: It might account for some of it.

The Court: I see. By the way, do you account for that discrepancy in answering that, Doctor?

The Witness: I don't know. I very often wondered about [546] it. It is partly, I think, a matter of—well, this is the sort of thing I do when I ask myself that question—proprietors, managers and officials are people who, when they get mail, have it put on their desk and it is opened for them, and they see it and it is answered and everything is nice and routine about it. If a laborer gets—

The Court: You mean all of them do?

The Witness: No, but my observation is that people of that sort are much more tidy than I am, for example. And I suppose that people of that sort very often get their mail at their business, because you need addresses, you see, to which to mail these. And craftsmen, operatives, domestic service workers—not domestic, laborers—I should imagine get their mail at home. I know there is a greater likelihood of my answering mail when I get it at my office than if I get it at my home, for one thing. I mean that is just one reason. I can think of 20 reasons.

The Court: You have never made any study of the reasons?

The Witness: There have been studies made.

The Court: But studies on sociology and statistics, you have never made any study as to why

(Testimony of William S. Robinson.)

it is that laborers and people like that do not respond to questionnaires?

The Witness: No, because the reasons of that kind are not so important as another and much better reason for this [547] lack of reliability in that you never do get a random sample of names, or rarely a random sample, to send your questionnaires to originally without too much labor for the people who send questionnaires.

The Court: I do not understand that answer.

The Witness: People who send questionnaires of this kind are, in the main, advertising agencies, consumer research agencies, commercial agencies of one sort or another. Now they are interested in a quick return on their money. They want results but they don't care particularly if they are too good. Generally they are using the information they get to sell services to their clients. Consequently they will take any available list, such as—and usually it amounts to—the telephone book or the city directory. They will select some names from it and send those cards out.

The list of the people to whom they send the post-cards are already so biased that the returns, that is, the differential tendency of different economic groups to return the questionnaires, that it doesn't make any difference.

The Court: You mean even the laborers who do have telephones?

The Witness: There are not sufficient of them so as to make any difference whether a laborer tends

(Testimony of William S. Robinson.)

to return the questionnaire or not. That is a practical reason why the matter has not been studied, as to why different types of people don't return them. [548]

The Court: Well, Doctor, the matter of influencing new foods, in food packages on the market, which is constantly being done, don't those people endeavor to find out the attitudes or desires of what you ascribe as the lower economic groups, people who weren't listed in the telephone book?

The Witness: They are not particularly concerned with it. I happen to have done a lot of that work, and I know.

The Court: Why?

The Witness: Well because they can sell—I don't know why but I know that they are not.

The Court: Is the appetite of the person using pancake flour different whether he lives in Beverly Hills or south of Pico and east of Hoover?

The Witness: It is a well-known fact that the poor person has a relatively little choice of what he can buy compared to the person with more money, for one thing.

The Court: Well, as a matter of fact, packages of pancake flour, of which there are considerable sold, are sold to everybody.

Mr. Margolis: It is a pretty expensive item on a poor man's table.

The Witness: I know as a fact that people—all right, J. Walter Thompson Company, or any of the advertising agencies—are concerned mainly with

(Testimony of William S. Robinson.)

finding the reaction of [549] people in the upper brackets and are not concerned with laborers in particular.

The Court: I was just wondering if you had made any scientific study of that or were up to this point satisfied with the reasons that have occurred to you.

The Witness: The reasons are immaterial. I would never use a questionnaire myself. What militates against them is the fact that they don't return them. It doesn't matter to me what causes it if they don't return it.

Q. (By Mr. Margolis): Is there any connection—

A. Why should I try to find out? You can't change people.

The Court: In other words, you consider it bias because they don't return it?

The Witness: That is an objective fact. It is objectively biased.

Q. (By Mr. Margolis): Dr. Robinson, is there any connection between the testimony which you have been giving and the facts you have given in your testimony, the opinions that you have been giving in your testimony, and the reliability of post-card polls?

A. Well, the connection is that those card polls, as is rapidly learned by people who try to forecast elections with them, are notoriously unreliable. [550]

Q. Just one or two more questions.

(Testimony of William S. Robinson.)

The Court: Well, they are getting a little worn out. That is one of the reasons they are getting unreliable, isn't it?

The Witness: Why should they wear out?

Q. (By Mr. Margolis): Have they ever been reliable?

A. Yes. Postcard polls were reliable before 1932, that is, nationwide political polls based on postcards or sending in clipped coupons were reliable, before the economic conflict, let's say, became apparent in the Presidential elections in the United States. I mean before the depression. The Literary Digest did fine before the depression. The instant economics came into it, postcard polls went out because they were economically biased in their returns.

Q. Now, Doctor you computed probabilities with regard to the exhibits which are in evidence here—I don't remember the exact numbers but all of the exhibits——

The Court: They begin with W-2 and run to II.

The Clerk: Not in evidence.

Mr. Margolis: Which are in for identification only; yes.

Q. You also testified concerning the probability with relation to some figures which I gave you separately and which I stated I had taken out of the case of *Smith v Texas*. [551]

A. That is correct.

Q. I want to know whether there was any difference in the method that you used in the two instances.

(Testimony of William S. Robinson.)

A. The method was precisely the same in the two instances.

Q. Now this last question, Doctor: At one stage of the proceedings you stated that you had never seen a group of sampling, or a selection, that was so far from a cross-section as the selection with which you were dealing here, that you were surprised at it.

A. That is correct.

Q. Now that you know the sources from which these questionnaires were obtained, the method of obtaining these persons, are you still surprised?

A. No, I am not surprised. In fact, it would be mathematically impossible to get a cross-section with that procedure.

Mr. Margolis: Cross examine.

* * *

Cross Examination

By Mr. Calverley:

Q. Dr. Robinson, I believe you testified in the beginning [552] of your testimony, or near the beginning of it, in connection with your testimony about that time you gave the illustration of placing a certain number of black and white marbles in a drum and drawing them out at random as a procedure similar to the modus operandi that is used here, is that right?

A. I don't know that I compared it to any other process. I was trying to give an idea of what random selection from an urn or drum consisted in.

(Testimony of William S. Robinson.)

Q. And from the numbers, if you know how many marbles are placed in the drum and what colors they are, you can predict within a certain percentage of what ones will be drawn out were they picked out in that manner, is that right?

A. That is correct.

The Court: That is assuming all of the marbles to be of the same weight and size?

Mr. Calverley: That is right.

The Court: Is that correct?

The Witness: That is correct.

Q. (By Mr. Calverley): Now of course that would be dependent upon the fact that the marbles were distinguishable as between black and white?

A. That is correct.

Q. Now if an individual was picking out those marbles [553] and he was to determine whether or not they were black and white, if he had defective vision in determining color, that would make that testimony unreliable, wouldn't it?

A. I believe that the distinction between black and white is not one which color-blindedness makes any difference to.

Q. Supposing the individual has a type of defect in his vision whereas he cannot distinguish between the two with any accuracy.

A. I am afraid I can't conceive of such a situation. You mean a blind man?

* * *

(Testimony of William S. Robinson.)

Q. Supposing some of these marbles were gray in color and it is a matter of opinion whether you call them black or white.

A. My marbles were black and white.

Q. I am assuming the situation in which a number of white marbles, a number of black marbles and a number of gray marbles were put in, and you had to compute from that type of a mixture of marbles, knowing how many were put in and [554] that the gray marbles would have to be distinguished as between black and white, could you conduct such an experiment?

A. That is not—it could be conducted, but it is not to within probabilities.

Q. It would be extremely unreliable because you couldn't determine which were black and which were white, at least as to some of them?

A. I think it would not only be unreliable, it would be silly.

Q. All right. In picking out this representative sample of questionnaires that you have testified to here, that sample consists of approximately a thousand, doesn't it?

A. Which sample?

Q. All of those exhibits which are in front of you which constitute the questionnaires of prospective jurors which are in evidence here and from which the individuals under your supervision made their computation.

A. I am not sure how many there are in it; I think it is a matter of record or I can count them, if you like.

(Testimony of William S. Robinson.)

The Court: It is about a thousand.

The Witness: All right. I just don't know.

Q. (By Mr. Calverley): Now who determined from those 1000 questionnaires what the prospective juror's occupation was from those questionnaires?

A. Some clerks did so under my direction.

Q. How many? A. In the main, one.

Q. Who was he? A. Mr. Jack Tenner.

Q. And how many others?

A. I think he did most of it. I am not sure.

Q. All right.

A. I know that my directions were given to him.

Q. Do you know of any others who did it?

A. No.

Q. Do you know whether there were two or five more or ten more? A. No.

Q. Did he tell you how many were working under his direction? A. No.

Q. Who is Mr. Tenner?

A. An employee of Katz, Gallagher & Margolis.

Q. Do you know whether or not he is associated with any labor union or what class of society he is in?

A. I haven't the slightest idea.

Q. Do you know whether or not he had any prior experience in statistical work of any sort?

A. I believe that he had not. [556]

Q. Now I believe you testified that as to the grand jury, prospective grand jury panel of February 1946, that you had instructed him to operate from those cards by telephone calls, is that right?

(Testimony of William S. Robinson.)

A. Not exclusively by telephone calls. If you will recall, first the city directory and then—what?

Q. Telephone calls?

A. All right. That was the last resort.

Q. Do you know how many calls he made in connection with getting the information which is the basis of your computation?

A. No, but I can find out if you want me to consult the yellow sheets. The source of the information for each individual is listed.

The Court: Do you want him to do that?

Mr. Calverley: I think it is a good idea, your Honor, if they are available there.

* * *

Q. (By Mr. Calverley): Here is X-1 to——

A. Shall we take one at random? [557]

Q. You might just take one at random.

A. Here is one at random.

Q. W-1?

A. W-1. Do you want me to give the name of the individual?

Q. Yes, you might give it.

A. Bernice Fitzmier Baumgardt, and the jury commissioner's record says she is a housewife. That is the source of the information.

The voters' register says that in 1946 Howard D., her husband, was a dentist. Therefore she was classified under dentists and ultimately got into the professional and semi-professional group.

You will find similar kind of things for each one of these.

(Testimony of William S. Robinson.)

Q. You haven't made any computation as to how many or how much of this information was obtained by telephone call and how much was obtained from the city directory, is that right?

A. No, but a small proportion was. The questionnaires are relatively complete. The only important groups of people for whom information was collected by telephone was housewives and retired. In the main, information on employed people, their record is on the questionnaire.

Q. Did you examine any substantial portion of these [558] questionnaires to determine whether or not the answer to question No. 5 was complete or satisfactory?

A. The answer was copied for my benefit on the sheets and I looked at those answers as copied.

The Court: You didn't look at the questionnaires yourself, did you?

The Witness: No. I looked at a few but not systematically at all. The words written were copied on the sheets.

Q. (By Mr. Calverley): In connection with those telephone calls, you do not know how Mr. Tenner, or whoever the clerks were who worked with him, whom they talked to on the other end of the line, do you?

A. No, not in any specific case.

Q. They may have talked to a 10-year-old boy, as far as you know?

A. They might have talked to a 2-year-old boy, as far as I know.

(Testimony of William S. Robinson.)

Q. You just took their word for what took place, what information they received?

The Court: You don't have any statistics on the number of 2-year-old children that can answer the telephone, do you?

The Witness: I do know this, I do know that we have these results simply to save the Court's time. We have these results given by employed persons and then we have them separated [559] given for the persons where we needed to go to supplementary courses for information, and the results are the same.

I am perfectly willing to go ahead and answer these questions, but as I have told you already the employed people in a great majority of the cases gave their occupation on the questionnaire and they were taken directly from that. The rest of the people are but a drop in the bucket and in any case two series show exactly the same results.

Q. (By Mr. Calverley): You have testified that you are a professor of sociology.

A. An assistant professor.

Q. Assistant professor of sociology?

A. Yes.

The Court: Whereabouts, by the way?

The Witness: University of California at Los Angeles.

* * *

Q. (By Mr. Calverley): In connection with your studies in sociology, you have studied human psychology, is that true?

A. That is correct.

(Testimony of William S. Robinson.)

Q. Have you observed in connection with your studies any tendency on the part of human beings to exaggerate the type of employment that they are engaged in when they are required to answer it in one or two words? [560]

A. Not particularly, especially on official records from some official agency of the Government.

Q. Have you observed a tendency, let us say, of a stenographer who works in a bank calling herself a banker?

A. I have never observed that; no.

Q. Assuming that an answer to one of those questionnaires, that the answer to question No. 5 was "telephone employee." Where would you class such a person.

A. We would get more information or classify it as unknown.

Q. Suppose he says "works for Southern Pacific?"

A. We wouldn't know whether he was a vice president or a locomotive engineer and we would try to find out or else classify him as unknown. That gives the industry but not his occupation.

Q. Supposing a person put down "artist?"

A. We would classify him under professional and semi-professional as an artist.

Q. He might be a tonsorial artist though, is that true?

A. I doubt it. He would say he was a barber. Tonsorial artist is only a phrase in situations of this sort, in courtrooms.

(Testimony of William S. Robinson.)

Q. Now referring to the summary of occupations of September 1946 petit jurors according to classification utilized in 1940 census—— [561]

A. If you are going to question me on that, may I have it?

Q. I believe there are a number of them before you.

A. Excuse me. Summary of occupations of February 1946 grand jurors.

Q. Of the September 1946 petit jurors.

The Court: That is AA-2.

The Witness: I have it here.

Q. (By Mr. Calverley): Now with reference to Class A, that is professional and semi-professional workers, can say as to that classification whether or not members of labor unions are represented in that?

A. I should think that there are very likely members of labor unions in the professional and semi-professional classification. I don't know whether there is a labor union for veterinarians or not.

The Court: There is one for actors though?

The Witness: But there certainly should be some. There are for designers, draftsmen, actors, artists, authors also.

The Court: Chemists, assayers and metallurgists?

The Witness: There should be some labor union members in that class.

The Court: Are there any for college presidents, professors and instructors? [562]

(Testimony of William S. Robinson.)

The Witness: Yes, there is at least one union.

The Court: Civil engineers?

The Witness: Yes.

The Court: Electrical engineers?

The Witness: I think so.

The Court: Mechanical engineers?

The Witness: I am not sure.

The Court: Technical engineers?

The Witness: I am not sure.

* * *

The Court: Musicians and music teachers?

The Witness: They certainly have a union.

The Court: Osteopaths?

The Witness: I don't know about the osteopathic union.

* * *

The Court: Physicians and surgeons?

The Witness: They have definitely a union.

The Court: Social and welfare workers?

The Witness: Probably they don't, but I am not sure. [563]

The Court: Teachers?

The Witness: Teachers have a union.

The Court: Trained nurses and student nurses?

The Witness: Well, I think they do.

The Court: Veterinarians?

The Witness: I have already indicated I don't know that, but I suppose there is a veterinarians' society.

(Testimony of William S. Robinson.)

The Court: Other professional workers. Would that be people working for these people?

The Witness: I suppose so.

The Court: Then there would likely be unions there among them?

The Witness: I am willing to admit that there are very likely to be large numbers of union members among them.

The Court: Let's go down the list. Dancers, showmen and athletes?

The Witness: I think there are unions.

The Court: Designers and draftsmen.

The Witness: I am certain there are.

The Court: Surveyors.

The Witness: I don't know specifically as to a surveyors' union, but probably there are some surveyors who are union members.

The Court: Other semi-professional workers.

The Witness: Undoubtedly there are union workers there. [564]

That classification is not relevant to this one, I am afraid.

The Court: Well, semi-professional occupations as given in this Dictionary of Occupational Titles that I referred to some time ago, put out by the Department of Labor—and incidentally while they list 29,000 occupations there are only 7000 of them catalogued or key-numbered here.

Do you mean to say that the census wouldn't have followed that?

(Testimony of William S. Robinson.)

The Witness: I mean just that. It may in some classifications and subclassifications agree with that, and may not. It is a matter to be determined simply by comparison each time. That is for the use of the United States Employment Service.

The Court: Well, they have semi-professional workers here. What were included in the census classification? For instance, they have aviators.

The Witness: Aviators are semi-professionals.

The Court: They have airplane pilot, aviator, instructor, and they have unions for those?

The Witness: Oh, yes.

The Court: Decorators and window dressers?

The Witness: I don't know whether there is a window dressers' union or not.

The Court: Color experts and interior decorators, commercial artists, dancers and chorus girls, designers, laboratory technicians, draftsmen. [565]

The Witness: You have some of them already.

The Court: Cameramen, radio operators and the like are included in this book under that. Were they included by the census, do you know?

The Witness: In the main they would be in this group also; yes.

The Court: So that there are unions for all of those.

The Witness: Yes, they are:

The Court: So that under A, your testimony is that there are unions for everything except architects, clergymen, college professors——

(Testimony of William S. Robinson.)

The Witness: I have not testified to that fact. Where I have known I have suggested it.

The Court: You don't know of any union for architects?

The Witness: That is right. There is the American Institute of Architects. Do you want to consider them as a union?

The Court: I don't know. It is what your opinion is now, whether you consider it a union or not. Do you consider it a union?

The Witness: I consider the professional societies a union. But this is a court. I don't know what the legal definition would be.

The Court: What the nature of the union would be or not? [566]

The Witness: If the American Medical Association is a union, so is the American Institute of Architects.

The Court: Then there would be unions for everything except perhaps the clergymen.

The Witness: That is right. They have synods which are unions, I suppose.

Q. (By Mr. Calverley): Referring now to Class C—

A. Are we going to leave out B?

The Court: Farmers and farm managers.

Q. (By Mr. Calverley): I will make inquiry as to B, farmers and farm managers. I don't know of any unions in connection with that group myself. Do you?

Mr. Margolis: The Associated Farmers.

(Testimony of William S. Robinson.)

The Witness: There is the farmers' union, isn't there?

The Court: Yes, there is a farmers' union.

Q. (By Mr. Calverley): Referring to Class C, there seems to be quite a few union groups there.

A. I think you will find union groups scattered almost completely throughout every one of those specific occupations, and in fact rather than waste time I am quite willing to grant it. [567]

* * *

Q. (By Mr. Calverley): Referring to Class C, are there a number in that group that are members of labor unions?

A. There seem to be; yes.

The Court: Let's take them specifically.

Conductors, railroad?

The Witness: Yes.

The Court: Postmaster and miscellaneous Government officials?

The Witness: I don't think so, unless the Government is a union.

The Court: Other specified managers and officials? You don't know what that breakdown included in the census, do you?

The Witness: No.

The Court: Proprietors, managers, and officials, mining, construction, manufacturing, do you know about that?

The Witness: I shouldn't believe that proprietors in the main would be members of unions. I suppose managers might. [568]

(Testimony of William S. Robinson.)

The Court: Managers of eating and drinking places, retail trade, finance, insurance and real estate?

The Witness: Well, managers, as I say, I believe might be union members, and officials also.

The Court: Business and repair services, personal services, what did that breakdown include in the census, do you know?

Mr. Margolis: I think, your Honor, if you want to get some accurate information on this we can get the Department of Labor Monthly Review, which will give you—I don't think that this witness claims to know all of the trade unions, where as the Department of Labor does have it.

The Witness: I just stipulated that I don't.

Mr. Margolis: The Monthly Review will give us accurate pictures, if that is what you want.

The Witness: If you insist on my guessing, I am perfectly willing to guess, but I am telling you that I am guessing.

The Court: This is a cross examination. Counsel is entitled to pursue whatever line of inquiry he desires.

The Witness: Then my answer is I don't know.

Mr. Margolis: If your Honor please, I am not placing this as an objection, I am merely making a suggestion. If counsel wishes to take advantage of it, he may. [569]

* * *

(Testimony of William S. Robinson.)

Q. (By Mr. Calverley): Dr. Robinson, in all of the 11 major headings or major classes of prospective jurors, or rather types of employment or classes of economic groups which have been included in your sample, would you say that labor unions are represented in all of those classes?

A. I think so except I am not sure about domestic service workers.

Q. Well, would you say that this method of selection of prospective jurors could be a good or a fair one or a poor one in so far as members of the labor unions are concerned?

A. Which method of selection?

Q. That was employed here in this district by the jury commissioner and the clerk.

A. No, I would not say that it would represent proportionately or representatively membership in labor unions.

Q. Well, from your examination you couldn't tell that, could you?

A. I can say that it would not.

Q. But you don't know how accurate or how good it would be?

A. Well, I do.

Q. What would you say in that regard?

A. If I might be allowed a small preamble, my reason for classifying individuals in these occupational groups, I [571] think I stated before was not because I wanted to know how many there were in the different occupations but because membership

(Testimony of William S. Robinson.)

in those occupational groups related to social and economic attitudes and particularly attitudes about labor unions.

The Court: Now answer the question. You said that is the preamble.

The Witness: It has been established, I think, or if you assume that it has been established, that these groups are disproportionately represented in the panels and juries, then there is additional evidence which would show that opinions as to labor unions are not correctly represented, and so forth.

* * *

Q. We are not assuming that there has been any incorrect or inadequate system here employed, but the mere fact that one group, economic group is overweighted in the selection system that wouldn't mean that there was a scarcity of labor union members where you have labor union members in that particular group to a great extent.

A. It might mean it.

Mr. Margolis: Just a moment. I object to that as assuming facts not in evidence. For example, the largest group here is proprietors, managers and officials.

The Court: This is cross examination. [572]

Mr. Margolis: I object on the ground the question assumes facts not in evidence. There is an assumption in the question, your Honor, that to a great extent proprietors, managers and officials are members of labor unions. I think that fact is not in evidence.

(Testimony of William S. Robinson.)

The Court: The objection is overruled. Read the question again.

* * *

The Witness: If you have labor union members in that group to a great extent, if it is, let's say, a majority or a great proportion of them are labor union members, and a great proportion of other groups are not labor union members, or if the proportions in the two groups are different in their labor union membership, then there would be a disproportion in the representation of the labor union membership in the group selected, if that can possibly make sense.

Q. (By Mr. Calverley): I notice that in Class D, referring to classification [573] 8, telegraph operators; 12, hucksters and peddlers and 13, newsboys, there are people, are there not, in the classifications commencing with D and continuing to K inclusive in the lower income brackets?

A. There are people in D and lower classifications in the lower income brackets.

Q. In other words, aren't people in the lower income brackets included in other classifications than K?

A. Oh, yes. What is K?

Q. That is laborers except farm and mine, which include fishermen.

A. Yes. In making this list, so as to have it progress from A to K in two respects, in economic or, let's say, in income, if you like, or more particularly economic status, and in social status as

(Testimony of William S. Robinson.)

well, and in general the progression is downward from A to K. Is that what you want to know?

Q. That answers the question.

You testified that people in the upper income brackets have certain attitudes. What do you mean by that?

A. I will quote you a result, let's say, from the Fortune poll which classifies people by their levels as given here. It groups the population of the United States, or rather the sample, which is a good sample, into two classes, professional and business, and that means our classes A and C, that is, professional and semi-professional workers, and [574] proprietors, managers and officials, and then it has a second class, which is the remainder of all those people except farmers, which are excluded from this particular tabulation.

In February of 1944, in the business and professional class, that is, classes A and C, 65 per cent of that class thought that labor unions had "gone far enough and ought to be curbed."

The percentage thinking the same thing in the remainder, that is, the so-called wage earning class, in that class 32.2 per cent of the persons thought that unions had "gone far enough and ought to be curbed."

That is an example of what I mean when I say that the people in these different economic classes have different social attitudes.

Q. Are you familiar with the method that was used in the Fortune poll?

(Testimony of William S. Robinson.)

A. I am, and I am familiar with the policy of Fortune Magazine which might not be called favorable to labor unions.

Q. Now is it recognized in sociology that there are certain attitudes based upon religion in the community?

A. That is true. Religion is one of what is called the background factors, or a general determinator of one's attitudes.

Economic status is another. Even age is one. There are a number of others as well. [575]

May I add another sentence?

Q. Yes.

A. By determiners, it is not meant that these are cogs; it is meant if you find people of different religious and different economic levels you find different attitudes among them, that is all.

Q. You testified that this method of selection employed here in the District Court in obtaining the names of prospective jurors was not conducive to obtaining a cross-section of the community, is that right?

A. That is right.

Q. What do you mean by a cross-section of the community?

A. I mean a sample or a group of picked persons in which the proportions of the different occupations and, let's say, religions or everything else, should be represented, let's say, within random errors, or let's say adequately represented, in ordinary terminology. A miniature cross-section in

(Testimony of William S. Robinson.)

which there may be some discrepancy between the picked group and the group from which it is supposed to be picked, but not glaring, consistent discrepancies, and particularly discrepancies which are persistent in regard to what a statistician would call Chi and which would tend to overemphasize one group and tend to underestimate another group over and over again. [576]

Q. Do you think it would be possible to obtain a cross-section of a community such as this with a population of over 3½ millions and give consideration to the economic groups that are contained in the summaries which are marked for identification here in the 11 major economic groups and give consideration to these religious groups that I shall now mention: Roman Catholics, Methodists, Presbyterians, Congregationalists, members of the United Brethren Church, Christian Scientists, Jews, both Orthodox and Unorthodox, Jehovah's Witnesses, Baptists, members of the Church of the Four-Square Gospel, Universalists, Unitarians, Seventh Day Adventists, Lutherans and Russian Molokans?

A. I do.

Q. Do you think that you could devise a system which would give a representative group of the economic classifications that you have mentioned, those religious classifications and these, what we may term social classifications or semi-political: Benevolent and Protective Order of Elks, Independent Order of Odd Fellows, Loyal Order of Moose, Masonic orders, Knights of Columbus, B'Nai B'Rith, Society

(Testimony of William S. Robinson.)

for the Advancement of Colored People, Daughters of the American Revolution, Veterans of Foreign Wars, American Legion, American Veterans of World War II, Reserve Officers of the Naval Services, Alumni Association of the University of Southern California and the Alumni Association of the University of California? [577]

A. I do.

Q. Do you think you could devise a system that would represent a cross-section of this community including the economic, religious, social groups that I have just mentioned, and also include: Republicans, Democrats, Prohibitionists and Communists?

A. I do. And the stipulation always is that these are chosen from an available list such as the list of the voters' registry, which I take it is assumed in all this.

The Court: Is the voters' register assumed in all this to be the basis of your questions?

Mr. Calverley: No, your Honor. I am asking him what method he would use to obtain all of these.

The Court: You are asking him whether or not he could devise a method?

Mr. Calverley: That is right. I am not assuming that the voters' register is necessarily a good test. He said it was faulty when he originally took the stand.

The Witness: It is the best that is available.

Q. (By Mr. Calverley): While we are on that question——

(Testimony of William S. Robinson.)

A. May I say one more thing, because I am not trying to hedge.

Q. That is all right. [578]

A. There is another question, that of practicality, which is involved to me. I could do these, I could get these if you would give me sufficient help and a field force to do it with, but I don't think it would be economical.

The Court: Do you think you could do it if you were a jury commissioner?

The Witness: No, I couldn't.

The Court: And had to do it in your spare time and were allowed only \$15 every six months?

The Witness: No.

The Court: And also were a clerk of a multiple court understaffed at present?

The Witness: I have to appear to hedge again. What is required, if you can use the voters' register, and it is an empirical matter to determine how representative the voters' register is, how representative it is with respect to religion, race, political preference, education or anything else that you like; it is an empirical matter to be determined in each case and could be determined with relatively little expense, though it might take some time. But on those properties of individuals for which the voters' register is a good source, the clerk could do it.

Now I don't know, and it is an empirical matter, just how far off the voters' register is on each one of these things. I know that it is better than any other available [579] list, but if you are talking now

(Testimony of William S. Robinson.)

about practically picking a group that will represent all of those things, that means to me picking it from voters' registry. It would be a matter for me to investigate myself to determine which, for those criteria of classification you have given me, religion, age, sex, race, certain political parties, that would be all right when picked from the voters' register. It is obvious there, or at least if not obvious you could make a good case for it but, as I say, I don't have the information, specifically detailed information, to answer those questions, if you are asking for the answers of a practical man who is going to pick on \$15 a year, let's say, a list of jurors.

The Court: Before you get to the question, let's pursue your inquiry further and include the different nationality groups.

The Witness: I was going to add some, your Honor.

Mr. Calverley: I was going to do that, your Honor.

The Court: Let's do that before we get off on the voters' register.

The Witness: Then let's go back to——

The Court: Just a moment.

Q. (By Mr. Calverley): Dr. Robinson, it is recognized in sociology, is it not, that there are various nationality groups and particularly in large communities? A. That is correct. [580]

Q. That have political and social significance. Isn't that true? A. That is true.

(Testimony of William S. Robinson.)

Q. And I think you could devise a system that would include all the groups that I have heretofore mentioned and would include Irish-Americans, German-Americans, Franco-Americans, Italian-Americans, Polish-Americans, Spanish-Americans, Mexican-Americans, Hungarian-Americans, Czecho-Slovakian - Americans, Russo - Americans, Chinese-Americans, Japanese-Americans, Armenian-Americans, and also include Chinese and Indians.

The Court: And Mexican-Americans.

Mr. Calverley: I mentioned them.

The Witness: I do, and I have done so in a comparable situation.

Q. (By Mr. Calverley): Do you think you could also include in that system a system that would result in a fair cross-section of this community by also including this factor, and that is the geographical factor and include the following communities: Glendale, Pasadena, Long Beach, Maywood, Lynwood, Huntington Park, West Los Angeles, Santa Monica, Chatsworth, Downey, Pomona, Beverly Hills, Torrance, Inglewood, Culver City, Burbank, Arcadia, Walnut Park, Ocean Park, San Marino, San Gabriel, [581] Manhattan Beach, Redondo Beach, San Pedro and Alhambra?

A. I do. And furthermore any method which would give representation on the other factors that you have mentioned would necessarily involve geographical positions as it is essential before determining so.

(Testimony of William S. Robinson.)

I might add, what you have asked of me has been asked of the political pollsters and has been done by the political pollsters who are still surviving to this day.

Q. Well, now you couldn't—

A. For the United States as a whole.

Q. You couldn't get any grand jury of 23 persons that would represent all of those elements, could you?

A. That is true.

Q. You could not do that?

A. That is true.

Q. And what would be the probability of ever getting a grand jury that represented all of these groups that I mentioned?

A. That is a question I can't answer because I would be glad to tell you why I can't if you want to know.

Q. Yes. I would be glad to know.

A. Obviously no 23 people can represent so many subcategories, the number of subcategories of different kinds of people which are involved in your lists, I suppose, in the millions, because if you give me nine divisions for religion, [582] let's say, and four divisions for education—which you didn't give but which ought to be included—then that means 36 subdivisions of both properties together. When you get through multiplying nine by four, by the number of categories in each of those major properties which you gave me, you would have a very number. So it is obvious that 23 people can't be scattered over a million or two or three categories

(Testimony of William S. Robinson.)

and fit into each one. What is required is not that they should represent but that they should be randomly selected from those categories, the millions, so that each person in each category shall have a chance of being included in any grand jury that is picked. So that the method of picking shall not exclude, shall not make it impossible, for a certain kind of person to get into the grand jury. That is all that is required.

* * *

The Court: Can I count on that as being the law that the Supreme Court is finally going to agree on?

The Witness: I am a statistician, not a lawyer, and I am telling you what is required for randomness or representativeness in a method of picking a sample from a population. Please don't ever make the mistake of assuming that I know anything about law. I know nothing whatever. I am only a statistician, as well as being a Democrat, but apart from that I am a statistician. [583]

Q. (By Mr. Calverley): You used the term "variability of different distribution." What did you mean by that?

A. I think I was referring to—I am not sure, I think I was talking about—oh, I think that I had been asked the question of whether or not there was more variation among the ages, let's say, than among the races or among some other properties or set of properties in different regions or communities. I think the question was something of this

(Testimony of William S. Robinson.)

sort, whether there was more variation in the ages in Los Angeles County than there was in the occupations in Los Angeles County. I think that is where I used the term in describing the question.

Q. Does that term mean, in trying to get a cross-section of all of these various groups, that you would have variations interspersed throughout your computations? In other words, you might have rich Catholics, poor Catholics and Catholics in all occupations, and then you might have Catholics that were members of the Veterans of Foreign Wars and those who were not?

A. Yes. I don't quite see the meaning of that question, but perhaps I will answer it as it appears to me and see if that is what you want.

To begin with, there is no question of picking, let's [584] say, persons in terms of their specific properties, that is, the method I envision is a method of picking randomly from a total group. Now it may involve controls in that it may involve picking the right proportion of persons from, say, Burbank or other areas—it doesn't matter what they might be—but the essential element to it, which guarantees in the long run the representativeness and the statistics which guarantees the fairness of the sample, is that all persons living or eligible, let's say eligible for jury service, or all members of the population, however you want to define it, shall have a chance to be included, or let's say, that the sample shall be picked at random and that statistically at random using random numbers or some other device shall be picked from the total group.

(Testimony of William S. Robinson.)

In other words, that there shall not be some pigeonholes with covers on the top into which you cannot reach to pick out cases. That is all. That will insure that there will be rich Catholics in the long run in the right proportion, and poor Catholics, many more of them because more Catholics are poor, in the right proportion, and every other possible combination of the millions of combinations of categories or properties in the right proportions.

Q. Let's assume that you have a community in which it is almost entirely composed of, let us say, Armenians. Now you would have to let that community be represented by one race exclusively, wouldn't you? [585]

A. You mean you have a sub-community, so to speak, a little area out here somewhere and there are only Armenians in it?

Q. That is right.

A. Well, I would have to let that area be represented by an Armenian.

Q. Yes?

A. Yes, provided that that area were large enough so that I would pick a case from it, or provided that the random method of picking areas happened to pick that area. It might be in a given sample that there would be no Armenians.

Q. Now you testified that the voters' register is a good source as a base from which to get the data upon which you base your computations.

A. I don't think I testified to that. I testified that it was better than any other published or known list.

(Testimony of William S. Robinson.)

Q. What are the faults with the voters' register?

A. The main fault with the voters' register is that—well, as far as jury service goes——

The Court: You might say that there are not enough Republicans on it.

The Witness: That is true. The danger—let me put it this way (and again it is a matter to be determined specifically whether it is at fault or not)—the danger is that [586] the voters' register—well that it falls into defect in one of two ways: that the number—of just kill that. Let me start over again.

If it doesn't include all persons who are eligible for jury service, let's say that it does not represent them proportionately as to their numbers, that is, that there be too many people of a certain kind in the voters' register, provided the voters' register does not represent all persons who are eligible; if the voters' register is in itself a sample, it might be a 90 per cent sample, of people who were eligible, but if it is a biased sample or partly biased, so that certain types of people are underrepresented in the voters' register, but those types of people are still eligible for service, as however defined by the law, then I would say that is a distinction into which the use of the voters' register might lead you, but it could lead you into no such errors, no such discrepancies, let's say, between distributions on the picked people and the total population as are involved in the exhibits here.

Q. It would lead to errors, is that right?

A. I don't know.

(Testimony of William S. Robinson.)

Q. You have never made a study of it?

A. Here is one case where it wouldn't: I don't know what the qualifications for a juror are, but if only registered voters, as I imagine is the case in some states, or in some places, can serve on juries then it is a perfect list.

The Court: I don't think there is any state where that requirement is a requirement.

Mr. Calverley: I don't think so either.

Mr. Margolis: The state of Texas, your Honor. Anyone who has paid the poll tax can vote.

The Court: Only those who have paid the poll tax?

Mr. Margolis: That is correct.

The Witness: But certainly the registry of voters comes closest to being an unselected published list of the people who I should think would be eligible for jury service, that is, people over 21, probably people who are gainfully employed, other gainfully employed people, and so forth. That is not a matter for me to determine unless you want to inform me as to what the qualifications are.

My main point is that it gets around much better than any other list such as the city directory.

Q. (By Mr. Calverley): I will advise you at this time in connection with my next question, to be a competent juror a person must be a citizen of the United States, of the age of 21 years, who shall have been a resident in the state and of the county and city for one year immediately before being selected and returned.

(Testimony of William S. Robinson.)

A. That is for a juror? [588]

Q. That is for a juror.

* * *

Mr. Calverley: I had just gotten to the end of the statement to the effect that a competent juror must be a citizen of the United States, of the age of 21 years, who has been a resident of the state and county and city and county for one year immediately before being selected and returned. Also he must be in possession of his natural faculties and of ordinary intelligence and not decrepit. And he must be possessed of sufficient knowledge of the English language.

* * *

Mr. Calverley: Well, the disqualifications are that a person shall not be convicted of any malfeasance in office, or of a felony. The next one is that he shall not have served as a juror or grand juror for a year and be now serving as a juror any place else. That is from the California [589] Code of Civil Procedure, Section 198 and Section 199.

* * *

Mr. Calverley: The requirements for registration, as I recall it in California, is that a person be 21 years of age and be a resident of the state one year and of the county three months and the precinct 30 days. That is my recollection.

Mr. Anderson: Forty days.

Mr. Calverley: Is it 40 days?

Mr. Anderson: And he must be a citizen.

(Testimony of William S. Robinson.)

Mr.) Calverley: Must be a citizen of the United States.

The Witness: If you want me to give you now a better answer to your previous question, I can do it.

Mr. Celverley: All right.

The Witness: I should say that the voters' register would be an excellent population from which to pick samples for jurors.

Mr. Calverley: All right.

Q. Now you testified that people in the lower income brackets have a tendency to move around more than people in the higher brackets? [590]

A. That is true.

Q. Now in view of the residence requirements, both as to registered voters and to be eligible to serve as jurors, wouldn't those classes be under-represented in the voters' registry?

A. It is possible that they would be underrepresented to some extent. They certainly would not be as underrepresented as they apparently are in the group from which the present juries have been selected.

Q. But they wouldn't have their fair representation? A. I don't know that they would.

Q. As far as numbers are concerned from the statistical viewpoint?

A. I don't know. I testified not that low income groups tended to move about a lot, I said they tended to migrate from one section of the country to another. Once they get where they are going it

(Testimony of William S. Robinson.)

doesn't follow that they move any more than wealthy people. The people who migrated here, I should imagine, have by now pretty well established themselves and I imagine that they have established the qualifications for residence.

Q. Well, the people in the higher income brackets tend to own their own homes more, do they not, than people in the lower income brackets?

A. Yes. As I say, there would be some underrepresentation [591] of the very low income brackets, but how much I don't know. I only know that it would have been relatively small in comparison with the apparent underrepresentation in the 30,000 cards, or the 25,000 or 30,000 cards, whatever it is.

Q. And it is true, is it not, that people in the higher income brackets tend to—I will withdraw that question.

Would you say that people in the higher income brackets tend to have higher intelligence than those in the lower income brackets?

A. There is no evidence whatever as to that.

Q. Would you say that as a rule they tend to have greater knowledge of the English language than those in the lower income brackets?

A. Do you want me to guess? I don't know of any evidence but I will guess, or tell you what my opinion is if you like.

A. Yes.

A. I should think they would be more verbal and would have a better command of language, but I should think the difference would be relatively small.

(Testimony of William S. Robinson.)

Q. Is it true, is it not, that people in the higher income brackets generally have better educations than those in the lower income brackets, is that true?

A. That is true. There are complicating factors in the situation, namely, that older people who tend to have [592] higher income tend to have worse education than younger people because people didn't go to school as long in the days when they were educated, but I think it is true in general.

Q. Now without referring to the questionnaire system that has been mentioned here, mailing out questionnaires, your testimony was that people in the professional and semi-professional workers class and the clerical, sales and kindred workers class, tended to answer the questionnaires, or any questionnaire, more readily than persons in other classes?

A. Yes, a larger proportion of them return the questionnaires.

Q. Using the questionnaire system which has been employed in the Federal Court here in obtaining jurors, that would be defective in obtaining a cross-section of the community, would it not?

A. Not necessarily.

Q. People in the lower income brackets, you have testified, do not tend to answer their mail?

A. Yes, but a municipality or, let's say, a court has the power—let me give you an example. I served as a juror in the Supreme Court of New York, which is the Superior Court here, and the

(Testimony of William S. Robinson.)

court clerk told me that his return on questionnaires was much better than mine. He got 98.7 per cent of his back, because it was a misdemeanor if people didn't send them back. [593]

There is an answer to the questionnaire method. It is perfectly all right to use it providing you can slap people with a fine if they don't answer.

Q. Where you have just the voluntary system, just have a person send it in voluntarily or not at all, you are not going to be able to get certain classes, economic classes, fairly represented on the panels, is that right?

A. I don't want to appear to hedge, but to explain. In the group which you get in there will be an underrepresentation of the low economic classes. Now if you send out twice as many questionnaires as you are going to need you can throw out some of your high income people, that is, you can, after you get your group, if there is at least some one from each of the economic classes, you can adjust your group by throwing out members at random from different classes to make it match the population, which is another device which has not been mentioned here before but is perfectly feasible.

It is one which is often used. Collect a large group carelessly but sufficiently well so you have all types of people. Then start throwing out the excesses until you have a group which in certain respects matches the population.

Q. You mean that they would have to adopt a policy of throwing out certain classes of question-

(Testimony of William S. Robinson.)

naires as they come in, on the basis of individuals in a certain class?

A. Yes, but they wait until all of them are in and [594] then if there are too many businessmen they pick them at random to throw out so as to not throw them out with a bias.

Q. You have heard testimony that approximately two-thirds of the questionnaires sent out by the clerk were not returned, is that true?

A. And to volunteer, I would worry about adjusting a sample on that basis even there. That is too few.

Q. So far as you know, those which were not returned may have been in any of these economic classes, isn't that right.

A. Yes, but I have a pretty good idea as to what classes they were or that they represented.

Q. You testified that the telephone directory is not a good source because it represents too heavily the higher income groups?

A. That is right.

Q. Have you taken into consideration in that statement the inability to get telephones in this area recently?

A. Yes, and that would make the tendency still more pronounced.

Q. Why?

A. Because the main people who have come into the area are low income people and they are the people who would not have telephones, even if they could afford it.

(Testimony of William S. Robinson.)

Q. Well, in your work you are not concerned particularly [595] with exceptions, it that right, to the rule?

A. Oh, I am more concerned with exceptions than I am with the cases which conform to the rule, because it is the exceptions which really give you new knowledge. You can call it the analysis, if you like, of deviate cases. They will tell you what else is involved in the situation other than what you know already.

Again I must make a distinction. Here I have been talking about the majority, I have not been talking as a social scientist trying to get information. It is the odd case that tells you more than all the rest of the cases that behave according to Hoyle.

* * *

Q. What is your age, Dr. Robinson?

A. I am—if you will allow me to make a quick calculation—34.

Q. How long have you lived in this community?

A. I was born in this community and lived here until—I was born here in 1913 and lived here until 1936. That is 23 years. I returned to it merely this last summer.

Q. Have you testified in connection with these matters in any other court in this community?

A. In connection with these matters? I have not testified [596] in a court in this community ever, except now.

(Testimony of William S. Robinson.)

Q. You testified a while ago with reference to the average wage or median wage, I believe was the term you used, of various wage earners in the United States.

A. And the figures I gave were my recollection vaguely of figures back some number of years ago, 1936, '37 and '8.

Q. Have you made any investigation as to the wages of fishermen in this area?

A. No, I haven't.

Q. You don't know whether their wage would be over or under \$1500 a year?

A. I really haven't the slightest idea.

Q. If a person, instead of being employed as a fisherman but owns several boats and operates them as a fishing business, how would he be classified economically?

A. I think the census—if he operates them on shares—classifies them as fishermen. If he owns the boat but doesn't fish, or something of the sort, then he is a proprietor. But I am not certain. I would have to look the matter up.

Q. If a fisherman stated that he was self-employed in the fishing business, how would he be classified?

A. May I hedge again? Fishermen would have no opportunity particularly to say other than what the census enumerator asked them to say. Now there is a regular list of questions [597] which are asked by census enumerators. I have the census blanks for 1940 at my office and I can find from the

(Testimony of William S. Robinson.)

files what those questions were. I have the instructions as to the enumerators on the desk there. But I can't answer the question until I know what the census enumerator would ask the fisherman.

Q. Well, if an individual who was a prospective juror put "self-employed" on the questionnaire, how would he have been classified?

A. Either as unknown, or we first would have tried to get information further to satisfy ourselves. If we hadn't been able to get it we would have classified him as unknown.

Q. If he said, "self-employed, fishing business," how would you classify him?

A. He wouldn't have the opportunity because either we would use the city directory, which I think would be quite specific if he were in it, which I doubt, or probably we would have gotten to him ultimately by a telephone call or if we had the time in person and we would have found out what he did.

Q. Did you instruct the individuals who examined these questionnaires where an individual said he was self-employed in a particular business to classify him or to contact him?

A. It depends upon the individual business. Whenever there were questions the matter was brought to me, but a self-employed [598] grocer, it is obvious what he is, a proprietor.

Q. Well, if a man said "self-employed, fishing business"?

A. I don't think there were any there so the question didn't arise.

(Testimony of William S. Robinson.)

The Court: Suppose he had said that.

The Witness: I have already told you.

The Court: Tell us again, will you?

The Witness: I am sorry. I would have tried to get more information. Had I not gotten it I would have classified it as unknown, occupation unknown.

The Court: But he said he was in the fishing business.

The Witness: He gave his industry but he didn't tell me what his occupation was.

The Court: Self-employed.

The Witness: Self-employed is not an occupation.

The Court: It is not?

The Witness: It is an occupation term and so listed by the census bureau.

The Court: You wouldn't classify him as a manager, by any chance?

The Witness: I would classify him, I have already stated, as unknown.

Q. (By Mr. Calverley): You don't know of course whether the subordinates [599] carried out all your instructions in that regard?

A. One person—I am reasonably convinced that they carried them out.

Q. But you don't know that as an actual fact; you relied upon the information they gave you?

A. That is correct.

The Court: Suppose a man said he was self-employed in the fishing business, wouldn't you classify him as a proprietor?

(Testimony of William S. Robinson.)

The Witness: I would not. I would classify him as unknown, if that was all I had. For all intents he might be self-employed fishing off the end of a pier.

The Court: What were these people that were classified by you as proprietors—just take your questionnaire there—proprietors of what?

The Witness: Let's find some proprietors here. Let's see if I can find some.

The Court: I am referring now to Exhibit AA-2. You have Exhibit AA-1.

The Witness: I was looking for one.

The Court: Well, take AA-2. That is the one I have before me, so your AA-1 would be the list.

The Witness: An owner of a roofing business. That is a specific case. That is Victor LeRoy Burkhardt.

The Court: Can you find his questionnaire?

The Witness: I can if you want me to look for it.

The Court: Did you classify it from that information?

The Witness: Those are the words which appeared on the questionnaire. That is the source from which I got the information. I forgot to give you that the occupation designation came from the jury commissioner's record.

The Court: There are 86 of them here.

The Witness: We will go on.

Occupation, jury commissioner's record, manufacturer.

(Testimony of William S. Robinson.)

The Court: You would classify him as a proprietor, manager or official?

The Witness: That is right. And these are all proprietors, managers and officials.

Manufacturer of women's blouses. That is another one.

A manufacturer—another one.

A manufacturer of toys. It gives the name of the company—in fact, I can't read it here.

Vice president and sales manager.

Treasurer of the Thomas Manufacturing Company.

A manufacturer of children's wear.

Manufacturer of wool products.

A production manager of some corporation.

Owner of plastic manufacturing and club supplies.

Vice president in charge of personnel and labor relations of Gladding-McBean & Company. [601]

The Court: You have indicated all those in that exhibit, have you?

The Witness: Yes.

Retired food manufacturer. He is retired but the occupation designation is given.

The Court: You don't need to take the time now to go through all of them.

The Witness: All right.

The Court: You might hand that exhibit to me and I will be glancing at it.

Q. (By Mr. Calverley): You made no computations, Doctor, as to whether or not these were or were not represented on the jury? A. No.

(Testimony of William S. Robinson.)

Q. In these classifications of economic groups, I don't notice any distinction as to whether or not the individuals work by the day or the hour.

A. That is correct.

Q. There is no such classification, is that right?

A. That is right. There is no labor, as I think of the classification, of day laborers but otherwise the distinction is not drawn. That is, as far as that goes, there is a subclassification somewhere. It is not one of the major ones.

It is true, however, that among the various groups there [602] are possibly different proportions who work by the day.

Q. In other words, people who work by the day or the hour may be in any of these classifications?

A. I haven't looked at them in detail—well, I don't think a professional worker would work by the day or the hour, and I don't think——

The Court: Do any of those in that Class A?

The Witness: Well, maybe they do. Artists probably do.

The Court: Civil engineer? Actors?

The Witness: As I say, I haven't made a detailed study of it, but I will now do so if you want me to answer the question.

The Court: Dentists? They work by the piece, I guess.

The Witness: That is right.

Q. (By Mr. Calverley): If I understand your answer, Doctor, it is that people may work by the day or the hour in any of these general classifications.

(Testimony of William S. Robinson.)

A. Very likely in any of these classifications. Certainly a commercial artist could work by the hour in the professionals, and I suppose you could find that there are cases in all of them.

Q. And labor could include mental or physical labor?

A. That is true, except most kinds of mental labor occur in the professional group and not labor, if you are [603] thinking of laborers.

Q. I am referring to a person, a laborer, who works by the day or the hour. They may be found in any of those classifications, might they not?

A. I am sorry. I don't understand your question.

Q. I will reframe it.

Isn't it a fact that laborers employed by the day or hour might be found in any of these classifications?

The Court: You mean laborers? He has a separate classification for them. Do you mean any of these classifications might be paid by the day or hour?

Mr. Calverley: That is right, for work performed.

The Witness: That is true.

Q. (By Mr. Calverley): What systems of higher mathematics have you used in making your computations? A. Here?

Q. Yes.

A. The actual computations involve nothing more complicated than—wait a minute. As far as

(Testimony of William S. Robinson.)

computing values of Chi square, which is a figure I computed and in looking up the answer I used a table. It was simple arithmetic. I subtracted one in a number from another, squared the difference, divided it by something else, and added them all up.

As far as the derivation of Chi distribution goes, or [604] the proximity to the exact probabilities there, I did no mathematical derivations but I used some functions from analysis, so-called. I used some exponential functions. They are tabled. And I also used some logarithms. I am sorry I forgot those. But they are well-known table mathematical functions which you look up in a good-sized library.

Q. You have given some astronomical figures as to the probabilities?

A. That is correct.

Q. Now that means of course that at random that particular type or composition of a grand jury would occur only once in these large numbers of times, is that right?

A. That is correct, except it is even hard for a statistician to say it all in one mouthful. It is a probability of getting a sample as divergent as the one which occurred, or more divergent, a sample as bad as this one, as divergent from the population.

Q. How close do you think any system would be able to bring that down to some fair probability, let's say?

A. It depends again upon what you define as your population. But if you take the registration

(Testimony of William S. Robinson.)

of voters and randomly select as I have indicated your probabilities will all—well, once in 100 million times you will get a probability smaller than one in one hundred. The probabilities will all be large numbers, acceptable numbers. [605]

Q. They will all be large in a large community, is that right?

A. It doesn't matter what the size of the community is; there will be numbers that are credible numbers. That is, the probabilities will be, let's say, larger than—my difficulty is that the probabilities will have a distribution, that is, there will be certain numbers of different sized probabilities and I am somewhat—well, I am unable to describe this situation to you. But the probabilities will be numbers, let us say, most of them a decimal point and then some number other than zero. They will be relatively few in which there are one or two or three zeros before you come to a digit other than zero. In fact—well, all right. That is about the best I can do.

Q. Almost under any system the probabilities wouldn't run over 1 in 10 to 100,000, under any system, would it?

A. Only one time in a hundred thousand would you get something occurring with a probability of one in a hundred thousand. That is how probabilities are defined. For example, I can give you an example of a sample which would have a probability, let us say, of .1, one tenth. Well, that is the kind of sample or the amount of discrepancy which

(Testimony of William S. Robinson.)

would arise in a random sampling one time out of ten, so you would expect that to occur one time out of ten.

If you went on doing this year after year ultimately if [606] you did it a thousand times you would tend to get once or twice a sample which, if diverged to the extent of having a probability of .001, or 1 in 1000. But you wouldn't get a run of them at least.

Q. From your computations can you state whether or not all of the other groups that I have mentioned, which include racial, social, geographical, religion, excluding the economic, would be adequately represented in this panel?

A. Any groups, however defined, would be, and that follows merely from the deductible definition of randomness. If you pick from a total group randomly so that the members of the group are accessible, all of them—in other words, you have the population—if you then select members from it at random any property you could imagine of those individuals, including whether or not they have diseased tonsils, will be fairly represented in the sample group.

The Court: Does that affect the person's economic viewpoint, if they have diseased tonsils?

The Witness: I don't know. It might be possible at that. Diseased tonsils can tend to make you depressed, and that might make a person a Republican.

(Testimony of William S. Robinson.)

Q. (By Mr. Calverley): You have heard the testimony that all of these racial groups that I mentioned, these hyphenated American racial groups, and these social groups that I mentioned, and [607] the religious groups, were not identical in obtaining these lists? A. That is correct.

Q. Well, then, how do you explain that the names that were drawn out of those groups would necessarily be disproportionate in so far as religious and racial and social groups are concerned?

A. Because religion, race and social position are correlated with occupation and particularly with income levels, and if something is disproportionate with regard to occupation it will be disproportionate with regard to anything that occupation makes a difference to or that is correlated to occupation.

Q. Wouldn't the geographical factor tend to throw that computation off as being inaccurate. You would have to balance it with the geographical sections of the area. A. Balance what?

Q. Well, you would have to get a fair cross-section of the community. You couldn't disregard the geographical consideration, could you?

A. That is what I said when you asked about geographic regions. I said if I was controlling this procedure—you were asking me then in general, not sampling from the voters' register—in sampling from the voters' register I would take a purely random sample, but if you ask me to go out with [608] a field crew to select a random sample from the

(Testimony of William S. Robinson.)

population, I would first control it geographically, that is, I would get the right number of people from the various geographic regions or I would select at random and perhaps with other controls as well within those regions.

Does that answer your question?

The Court: On your previous answer, I don't know that I quite understood you. I understood you to say that by virtue, for instance, of the September 1946 petit jury being overweighted with proprietors, managers and officials, so far as what you have described as economic classes, it would likewise be overweighted as to race and religion. Did I understand you correctly?

The Witness: If that is a correlation, and I say there is a correlation in general, between income level and religion. If you want to know what the occupations are I can list them for you.

The Court: Then I am to understand that by virtue of their having been 86 of the group on there you do not have a proper representation of the races or of religion?

The Witness: I think that is correct. For example, the higher income occupations are overrepresented there.

The Court: In what race are they overrepresented?

The Witness: Let's take religion first, since race is another matter. They are underrepresented in Catholics. [609]

The Court: Proprietors and managers and officials?

(Testimony of William S. Robinson.)

The Witness: Not the whole group, just that jury.

The Court: I am speaking of this one classification. Now you say by virtue of that being overweighted, it is underweighted in Catholics, that is to say, that there are less Catholics among that group than others?

The Witness: There are less Catholics among that group than there are—again if you want me to make a statement I will have to make it statistically. No single group is underweighted or overweighted. The point is, the whole distribution of occupations is overweighted in certain groups and underweighted in certain others.

The Court: As to occupations?

The Witness: That is correct. Now there are more persons in this whole group from high income levels than I should imagine are quite fair as regards the total population. That would mean, and it may not mean on this group but in the long run if you kept doing that you would find that those groups overweighted on the high economic levels would be underweighted in Catholics. They would have too few Catholics if they have too many high income people.

Likewise, if they have a large number, a disproportionately large number, of high income people they will have disproportionately a low number of Mexicans.

The Court: How about the national derivation, would you [610] say that this is likewise overweighted as to national derivation?

(Testimony of William S. Robinson.)

The Witness: I used the term Mexican already.

The Court: Only as to Mexicans then?

The Witness: No, but that is an example. If you want to find out what the express correlations are, or the Irish, German and the rest, I can find them, but I know in general what those patterns are, and that Negroes, Mexicans, the foreign-born in particular, tend to fall primarily in the low income groups, and that the native-born whites are overweighted in the high income groups. So if you pick a high income group, or a high economic group, you get too few foreign-born, too few Mexicans and too few Negroes. You know that as a fact, your Honor. Everybody knows it.

The Court: I thought I knew something before this proceeding started, but I am not quite sure now.

The Witness: Will you find any Negroes in the top 5 per cent of the incomes in Los Angeles County?

The Court: You answer the question as long as you are asking it.

The Witness: You find too small a proportion naturally.

The Court: Now on the 86 here and the 44 and the different classes——

The Witness: You are referring to W-2 now?

The Court: Yes. [611]

The Witness: I have my WW-2.

The Court: Take AA-2.

The Witness: AA-2; all right.

(Testimony of William S. Robinson.)

The Court: On the social scale, is that what you call it?

The Witness: This is a scale of social economic status.

The Court: This is the social economic status. Well, the lodges and clubs counsel referred to in his question, would you say by virtue of this being overweighted that it is overweighted as to them, and if so which ones?

The Witness: I really wouldn't say that it was necessarily overweighted there for the reason that the club membership is so small that I don't want to make a statement about that.

The Court: You don't know?

The Witness: I will tell you this, if you were to take a sample of 188 cases, as this one is of 188 cases, you would get in it proportionately more club members than there are in the population.

The Court: Very well.

Q. (By Mr. Calverley): What is your computation as to the various religious groups?

A. I have made no computations in respect to religious groups. [612]

Q. Your conclusion then that certain religious groups are found in certain economic classes, that would vary with the community, isn't that right?

A. Yes. The proportion certainly vary. In general it is true that Catholics are—perhaps I am giving you a false impression but these correlations are not.

The Court: That is quite possible.

(Testimony of William S. Robinson.)

The Witness: I am very much aware of the fact. These correlations are not very high. For example—well, the only one I can remember is that their figures indicate that there is a correlation between color and illiteracy. That is, Negroes tend to be illiterate much more than whites. If you want figures on that, I can give it to you. It is one out of ten whites that is illiterate and one out of four or five Negroes is illiterate. So if you pick whites you are picking people for whom there is a greater proportion of literacy. But the differences are not very marked.

Q. Well, the fact that a great many Negroes are illiterate and that they are in the economic bracket, that would tend to reduce the proportion of laborers in Class K who would be eligible for jury service?

A. Negroes are illiterate, incidentally, primarily in the South, not here.

The Court: Then your previous statement does not balance, as to the one you just made previously based upon the [613] proposition that the Negroes are illiterate?

The Witness: It is true for the United States as a whole, but the percentage of Negroes who are illiterate will vary widely between states, as religious groups vary widely between states and areas.

The Court: Have you taken any statistics here on the matter of illiteracy?

The Witness: Would you care to see the figures? They are on the desk. I happen to have finished writing an article for the Journal of American Civics Association.

(Testimony of William S. Robinson.)

The Court: You have taken those figures?

The Witness: I have taken those figures.

The Court: What are the figures here for illiteracy?

The Witness: I haven't the slightest idea, but I have them there if you want to know.

Mr. Margolis: Is this the article you were talking about?

The Witness: Yes. I think that that article has embodied in it only the divisions in the United States, of which there are nine or ten, but I have them for California.

This article is called "Ecological Correlations on Behaviour of Individuals." It is completely irrelevant to the Negroes. They are used just as an example.

The Court: They are irrelevant to your article?

The Witness: Yes. I will find you the page on which it [614] gives the number of literate and illiterate Negroes and whites.

The Court: In Los Angeles County?

The Witness: No, I have no figures for Los Angeles County.

The Court: You have none?

The Witness: No.

The Court: Do you have them for the state of California?

The Witness: In my brief case I have them. Here I have them only for the Pacific division.

The Court: The Pacific division?

The Witness: Yes.

The Court: Are they based on the 1940 census?

(Testimony of William S. Robinson.)

The Witness: No, they are based on the 1930 census, for a reason that is given in the article.

The Court: The 1930 census?

The Witness: Yes.

The Court: That wouldn't be very valid now, since there has been a large increase in population here.

The Witness: The proportions. They are based on the 1930 census for a reason given in the article, but if you care to read the figures, they are here.

The Court: Not for the 1930 census.

Q. (By Mr. Calverley): The illiteracy of a large segment of any given community [615] would tend to make that group's representation on any jury panel disproportionate, isn't that right?

A. Not necessarily.

Q. As to the numbers of people in that class, that low economic class, because they wouldn't be able to answer any questionnaires?

A. But I am not——

Q. You couldn't get results from a source where the individuals are not only ineligible as jurors but couldn't comply with the questionnaire requirements?

A. The largest proportion of illiteracy that I know of in any state is about 1 in 5, which means that 4/5 of that group are illiterate, and all you need to do, if you are picking people, is to pick a few more of them and then throw out those who are illiterate, send a few more questionnaires to Negroes and to Negro areas. [617]

(Testimony of William S. Robinson.)

On the population estimates that were given to me this morning by the Regional Planning Commission, they estimated 3,747,962. Assuming that that is an approximately valid estimate, and taking into consideration that the December 27th registration, that is, the present registration of Los Angeles County, is 1,277,418—let's take the next assumption that 27½ per cent of them are under 21 years of age—I have made that calculation, that would be 1,040,689, which would leave 2,707,273 over 21 years of age.

Then we will take the registrations, 1,277,418. That would indicate that there were 1,529,000 or roughly 1,530,000 persons over 21 years of age in Los Angeles County whose names do not appear upon the registry of voters lists, which is a greater number than those that are registered.

Now in view of that would you say that a fair cross-section of the community could be obtained by the random method of selection that you have suggested confined only to the voters' registry?

Mr. Margolis: Just a moment, your Honor. I want to object to that question because instead of using the large registration figure which is available, which is only a few months old, isn't there a larger registration figure of 1,800,000?

The Court: They are not registered now. If you are going to use this you have to use the present list. [618]

Mr. Margolis: There is no testimony to that effect. Any reasonably recent list, the largest reas-

(Testimony of William S. Robinson.)

onably recent list that you could get would certainly be better, let's say a list that is three or four months old and it was larger than a list of today would certainly be better.

The Court: Counsel, I do not think your objection is valid at all. The 580,000 people are dropped because they didn't vote.

Mr. Margolis: That is right.

The Court: And I think everybody that has lived in this community any length of time knows that there is a great segment of the people who lose the right to vote because they move from place to place.

In any event, this is the current registered voters list, and I would like an answer to my question.

Mr. Margolis: I want the record to show my objection. I object to the question on the ground that it makes an unfair and an unreasonable assumption.

The Witness: The answer is that that is a matter to be empirically determined after studying the addition of probabilities in the voters' register or a random sample from them with a distribution of the population. I don't know.

The Court: Well, if that is the case then how are you qualified to express an opinion on the present voters' register? [619]

The Witness: I know it is better than the present method of selecting jurors, that is all. And I have given my reasons for knowing that it is better.

The Court: I know, but in connection with this, your testimony here, I have taken advantage of your knowledge and experience in an endeavor to find

(Testimony of William S. Robinson.)

some way which might be a better method of selecting a cross-section, and you have said the voters' register——

The Witness: Is a better method.

The Court: ——is a better method than the one we have?

The Witness: That is right.

The Court: But there is still more than half the people that would not be represented on the voters' register.

Mr. Margolis: I object to that assumption, your Honor, assuming a fact contrary to the actual facts as to what is available.

The Court: I am sorry, counsel. Will you explain that?

Mr. Margolis: Yes. This assumes that the only registry of voters that is available is the one having 1,200,000 voters, roughly that, whereas there is a recent registry available having—I don't have the exact figures—but having many more than that.

The Court: It was the December figure.

Mr. Margolis: The December 1946 figure.

The Court: December 27, 1946. [620]

Mr. Margolis: And your Honor has the exact figure there. I don't have it.

The Court: It is 1,861,000.

Mr. Margolis: I object on the ground that the December 1946 figure of 1,800,000 as between December 1946 and February 1947, that certainly that December list would be a far more representative list than the one that is available. I think that any

(Testimony of William S. Robinson.)

assumption that some 500,000 or 600,000 people have moved is just an assumption that has no relationship to what we know about what people do here.

The Court: In connection with your latter statement, counsel, I do not wish to be put in the position of testifying, but your statement that it is contrary to what people know, you may be interested in knowing that I spent considerable time studying voting statistics, and the movement of people in Los Angeles, and when I spent my time I discovered that in two years 40 per cent of the people moved.

Mr. Margolis: I think that was at a time when the present housing shortage did not exist.

The Court: I think that is true too, but in any event your objection is overruled on the ground that this is not a fair question. I am only asking for his opinion and asking him to take these assumptions.

I still don't know what the answer is.

The Witness: Well, let me put it this way: It is my [621] opinion that to use 1,300,000 roughly would be infinitely better than to use 30,000. Is that what you mean?

The Court: No, that isn't what I mean.

The Witness: You would get in more kinds of people.

The Court: That isn't what I mean at all. How can you have a fair cross-section of a community when you have represented on that list less than one-half of the population over 21 years of age? That is the long and short of it.

(Testimony of William S. Robinson.)

The Witness: You may have a group of 10,000 which is a fair representation of the whole community, I don't know. It is a matter to be determined how fairly they represent the community.

The Court: I think you understand pretty well what I am driving at. You have based a lot of testimony here upon the proposition that the voters' register was the best method which would be available here?

The Witness: That is right.

The Court: Now any method which would purposely exclude 1,529,000, or more than half the population, or assuming that there were 583,000; taking the previous December figures, would you say that you could obtain from that a fair representation of the population of the county?

The Witness: Would it not be excluding those very people who are ineligible because of moving, or at least a good portion of them? [622]

The Court: No, that does not constitute a ground of ineligibility.

The Witness: I understood that some kind of residence qualification was necessary.

The Court: They have to live in the state more than a year before they can vote, as I remember.

The Witness: Residence of one year, I have it in my notes, for jury service.

The Court: That is right.

The Witness: All right. Well, I can only answer you that it is an infinitely better cross-section, and it must be, than one based on 30,000 cases.

(Testimony of William S. Robinson.)

The Court: Your only answer is that it is better than the one we have?

The Witness: And it is the best of any that can be based on a public or known list, and that is required before you can take a fair sample, unless you want to spend a lot of time and a lot of money getting the members of your sample.

The Court: Would this be representative of the whole population of the county so that a fair cross-section could be obtained? That is what I am trying to get your opinion on.

The Witness: I don't know.

The Court: You don't know?

The Witness: Because I haven't found out. I haven't studied it. It would certainly be more representative than [623] the samples you now have.

The Court: I think you have told us that a number of times. What things would you want to find out?

The Witness: I would want to take a sample from the voters' register and send out some interviewers.

The Court: From the voters' register?

The Witness: Yes.

The Court: You wouldn't want a sample from the people who are not on the voters' register?

The Witness: For the people who are not on the voters' register, unless you want to spend a great deal of money you have to rely upon the census.

The Court: The census doesn't furnish any names and addresses.

(Testimony of William S. Robinson.)

The Witness: No, but it tells you what the distribution is on certain important characteristics; the question is of getting the same distribution by occupation, by race and by other things. Now I may take a sample from the voters' register and find the race and occupation and other things for those, I would say, 1000 people and compare the distributions or the percentage in various class of those people with the percentages as given for the total population by the census, and then I could answer your question. [624]

* * *

The Court: Now in connection with your studies made and represented here by Exhibits W-2 to II, did you make the same kind of study for the jurors or any portion of them which were currently selected by the County, according to Mr. Janney's testimony? [625]

The Witness: No.

The Court: You did not?

The Witness: No.

The Court: When you instructed your assistants to inquire into the occupation of the various persons whose occupations are not reflected in the questionnaire, did you instruct them to inquire into their past occupations or ask them how long they had been in the particular business they were engaged in?

The Witness: No. The census does not either.

The Court: I am not worried about the census, I am only asking about what you did.

(Testimony of William S. Robinson.)

Q. Did you make any inquiry at all concerning any of the persons whose occupations you classified here concerning what their occupations were, if they had ever had any at any time?

The Witness: No.

The Court: Now will you take Exhibit W-2—I think you have the original there——

The Witness: I might add that in the case of the retired, if you consider being retired an occupation, I did.

The Court: You asked what they previously had done?

The Witness: Yes.

The Court: That was a very small percentage of the people though? [626]

The Witness: That is right.

The Court: Take Exhibit W-2. You have expressed your opinion, in response to quite a number of questions by Mr. Margolis and by myself, but I do not think that you have stated on complete answer in which you would state your postulates and premises and your reasons for your conclusions. Will you take the W-2 Exhibit. What are your premises? What did you start with? What did you take into consideration?

The Witness: I assume first that the occupations will be correctly classified.

The Court: You made some assumptions concerning population first, didn't you?

The Witness: The particular form of reasoning I assumed——

(Testimony of William S. Robinson.)

The Court: You started out by assuming that the population of the county as of the 1940 census was so much, is that correct?

The Witness: That is correct.

The Court: Then you started and next assumed that the census classification of occupations was a representative cross-section of that population?

The Witness: Yes. I took the census figures for the percentages in the various occupations.

The Court: But in doing that you assumed that these headings were a representative cross-section of the occupations? [627]

The Witness: Yes. In other words, that they, let's say, exhausted the occupations.

The Court: And that they were fairly representative of the cross-section of the occupations, or that these were a cross-section of the occupations?

The Witness: I see what you mean.

The Court: You assumed that?

The Witness: Yes.

The Court: Now go on from there as to what your assumptions were.

The Witness: Then I assumed as a hypothesis to be tested, let's say, that these 23 cases had been drawn at random from a representative cross-section of that population already assumed.

The Court: The 23 cases?

The Witness: Yes. I am dealing with the right-hand column now. Then I computed the probability of getting that drawing of 23 cases on that assumption that they were a random selection from a rep-

(Testimony of William S. Robinson.)

representative cross-section of that population. That is all. The probability turned out to be very slight.

The Court: One of the factors which was a constant factor, if that is the correct term, was that the population was the 1940 population? [628]

The Witness: That is correct. Then noticing that the probability was so very slight I looked for elements, let's say, in my chain of assumptions which would make the probability very small and the one to be tagged, so to speak as the one, since these items were randomly selected, these 23 persons were randomly selected from the cards, the only alternate explanation for the great discrepancy is that the list from which they were selected randomly is not representative.

The Court: I understand. Let us go back to your assumptions again. In making your mathematical calculation that constant factor was the 1940——

The Witness: Occupational distribution.

The Court: Was the occupational distribution?

The Witness: Yes.

The Court: In other words, you had to assume that there was the same number of actors that they gave there?

The Witness: The same proportion; same percentage.

The Court: The same percentage?

The Witness: Yes.

The Court: Then you didn't use the 1940 census as a constant factor, did you?

(Testimony of William S. Robinson.) :

The Witness: Yes. I assumed that the percentage of professional workers remained the same up until 1946, in other words, and the percentage of the business proprietors, managers and officials in the population remained the same. [629]

The Court: Then you did not use the population of 1940 as a constant factor, that is, the total number of people in the country?

The Witness: No.

The Court: It was only the percentages?

The Witness: There is no reason for using the total population.

The Court: I am not asking for the reason, I am asking whether you did or didn't.

The Witness: No, I did not. To be quite specific, I did because I divided the population in a given group by the total population of the county to get the percentage. [630]

* * *

EDMUND L. SMITH

recalled as a witness, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

(Continued)

The Court: The first question I have is in connection with the city directory. You said the other day that you had a 1942 city directory. Why don't you have a subsequent city directory?

(Testimony of Edmund L. Smith.)

The Witness: The city directory I have is labeled 1941-1942, and some time ago inquiry made from the company that publishes it, and with whom we have a standing order for a copy, they stated they didn't know when they would publish a new one.

The Court: That is the last one that was published?

The Witness: That was the last one published that I am informed had been published.

The Court: The Administrative Office of the United States Courts does, however, furnish you with a copy of the directory?

The Witness: Yes. I believe it costs \$25.

The Court: Now did you make some inquiry from the registrar of voters' office concerning the cost of the voters' lists?

The Witness: I did. I called Mr. Donahue personally [639] and inquired of him from whom and how much the list of the roll of voters from Los Angeles County would cost, and he said it could be obtained from the County for \$930.58.

The Court: Did he indicate whether or not the roll presently available has on it names which will be excluded from voting after December 27?

The Witness: Yes.

The Court: They do have them on it?

The Witness: The last list published as of November of last year has a list of names of 1,861,145 names, which he stated was approximately 70 per cent of the registration.

(Testimony of Edmund L. Smith.)

The Court: 70 per cent of the qualified voters?

The Witness: I assume that is what he means.

The Court: That is the list before dropping of some 500,000 which were dropped in December?

The Witness: Yes. That list includes over half a million which have been since dropped. There will not be a new printing of the list until May 1948.

The Court: And since then there have been additional registrations, I suppose?

The Witness: There have been over 100,000 in the city of Los Angeles new registrations not on the list.

The Court: All right.

Now I asked you to bring into the courtroom one of your boxes of cards. Do you have that in front of you? [640]

The Witness: I do.

The Court: Now that is not the available box?

The Witness: No.

The Court: The available box is made up of how many boxes just like that?

The Witness: There are about nine or ten similar boxes at the present time.

The Court: I understand from your testimony, and I am not sure whether the record is or isn't clear, but in any event with this box in front of us we can clear it up. The names on the list submitted by the jury commissioner do not get into the available box until after they have been summoned to serve on a jury, and that when he submits a list of names you select cards at random from your available box and put them with his list of names, sending out

(Testimony of Edmund L. Smith.)

questionnaires, and from there on with the processing which you have described. Now is this the box containing names of his which have not served or been summoned on juries as well as the cards taken by you from the available box? Let's cut it short: What is that box?

The Witness: This is a working box that I obtained a few months ago prior to receiving index cards which I had ordered some six months before that.

The Court: I don't mean what is the physical box, but what is in the box. Where do the cards come from? [641]

The Witness: These cards in this box are cards that I selected at random; a partial selection—I hadn't completed it yet—of cards from the available box.

The Court: All of them?

The Witness: No. There were a few cards which had been made up from the jury commissioner's list prior, and erroneously I might say, to the sending out of questionnaires. So those cards were placed—I gave it to one of the clerks and had those placed—with the others in alphabetical order for the purposes of mailing questionnaires to these prospective jurors.

The Court: So that that box is the current box upon which you are now mailing questionnaires, or will mail questionnaires in your next questionnaire mailing?

(Testimony of Edmund L. Smith.)

The Witness: That is correct. I started this several months ago in a contemplation of mailing questionnaires because there were only 17 names left in the box—no, at the time of the emptying of the box, and these are the cards to whom questionnaires had not yet been mailed and were therefore not ready for the box at the time.

The Court: For the master box?

The Witness: Yes, at the time the commissioner and the clerk placed the names in the box on January 2nd of this year.

The Court: Now before those names get into the master box they go through your process of either being weeded out [642] by questionnaires, summoned, excuses, or they go into the master box and from there the jury is selected, and after that they go back into your hold box for two years and then into the available box, is that right?

The Witness: That hold box is part of the available too, but considering the whole thing as available.

The Court: But you hold it for two years?

The Witness: Except those that were excused permanently or deceased and those cards are temporarily placed in a leave-out box for discards and other uses.

The Court: Can you tell from that box, of the cards there how many of those people originated with the jury commissioner and how many originated from you?

The Witness: Deputy Clerk Horn had counted the cards and I believe it is closely approximately correct.

(Testimony of Edmund L. Smith.)

The Court: What is the total number of cards?

The Witness: The total number of cards here at present is 1239.

The Court: Now he classified them by——

The Witness: Prospective jurors never called and never served, 266. That I would say are the cards referred to, almost all of them are the cards made up from the jury commissioner's list and which were not used prior.

The Court: Now what are the other classifications you have in that box? [643]

The Witness: The others I would say came out of——

The Court: What are the classifications?

The Witness: Jurors called and excused and not served, 215.

Jurors called and served once, 208.

Jurors called and served more than once, 288.

Jurors called more than once and served only once, 262.

The Court: What was the first classification, those prospective jurors never called?

The Witness: Never called and never served.

The Court: How many?

The Witness: 266.

* * *

Cross-Examination

By Mr. Margolis:

Q. When you made your inquiry of the registrar of voters, Mr. Smith, did you find out whether you

(Testimony of Edmund L. Smith.)

had to buy all of the precinct lists or whether you could buy selected ones or whether it would make any difference in costs?

A. My inquiry was, on account of the orders of the court, that it would require the whole county list.

Q. You didn't make any inquiry about buying selected lists? [644]

A. No, I didn't.

Q. On this question of new registration of 100,000 people, as I understand it, that new registration would include any of the 500,000 or 600,000 who permitted their registration to lapse and who have re-registered?

A. That is correct. And Mr. Donahue states that he estimated that there would be out of that half a million stricken from the rolls for non-voting approximately 121½ per cent or better re-registered either at former addresses or at new addresses.

* * *

Cross-Examination

By Mr. Calverley:

Q. Mr. Smith, did you observe whether or not the names which you find in your available box are residence or office addresses?

A. They are almost in all instances residence addresses.

Q. When you obtained lists yourself did you look for residence addresses or office addresses?

A. Always residence addresses.

(Testimony of Edmund L. Smith.)

Q. You gave me a list the other day entitled "Residence [645] Zone Sections of Jurors Impaneled February 10, 1947." What does that indicate or what is it?

A. This is a compilation of the jurors impaneled for this term as to mailing zone numbers in the city of Los Angeles and the names of outside cities or towns near the county.

Q. Does this list indicate the number of jurors impaneled from these various zones and from the various outside cities? A. No, it does not.

The Court: The number in the master box?

The Witness: No, this is merely an indication of the territory or geographical distribution of the residences of the jurors.

The Court: Is that the jurors in the master box or the ones who have been pulled out of the box?

The Witness: Of the ones who have, as it states here and as the district attorney stated, the jurors impaneled for the February term.

The Court: The jurors impaneled?

The Witness: Yes.

The Court: You have made no such compilation for those put in the master box?

The Witness: Not of the total; no.

The Court: Of the 800 and some-odd that you testified to the other day? [646]

The Witness: No. These are only those we got after the impanelment.

(Testimony of Edmund L. Smith.)

Q. (By Mr. Calverley): Then the column on the left under the heading "Los Angeles Zone Numbers," would indicate that jurors were drawn from all of these zone numbers underneath there?

A. That is correct.

Q. And this total figure down here wouldn't mean anything?

A. That wouldn't mean anything.

Q. Then the column on the right, "Outside Cities," that column indicates that jurors were drawn from all of those cities?

A. That is right.

Q. On the panel for the February 1947 term?

A. That is correct.

Mr. Calverley: We offer this in evidence, your Honor.

* * *

Mr. Calverley: The total at the bottom may be taken off as it has no significance.

The Court: No. 6. [647]

* * *

Cross-Examination

By Mr. Margolis:

Q. Is this a list of the outside cities in Los Angeles zone numbers for the grand jurors or for the trial jurors of the February 1947 term?

A. I understood this was the petit jury, but I would have to verify that. One of my deputies made that up. Whether he included the 23 jurors—I don't believe he did.

(Testimony of Edmund L. Smith.)

Q. How many persons does this cover?

A. That covers between, as I stated, those who were impaneled on the 3rd of February, between 100 and 150. Now some of those jurors are available now, a few have been excused by the judge to report a little later, but they have been impaneled and they are included.

Q. Can you get the exact figure, the number of persons who are covered by this? Would that be available?

A. Yes.

Q. I would like to have that. Do you know, for example, how many persons in this group came from Beverly Hills?

A. No, I wouldn't.

Q. You would have no way of knowing that?

A. No.

The Court: Isn't it indicated on there, their mailing address?

Mr. Calverley: No, your Honor. All that it indicates [648] is the sources from which the panel was drawn, the location of the persons. It is just for geographical purposes only, and as to the numbers it doesn't indicate the numbers but it says that some of them were drawn from all of the localities.

The Court: I see.

Q. (By Mr. Margolis): From all that appears from this exhibit, for example, 50 people might have come from Beverly Hills and 1 person might have come from zone 34?

A. That is right. It doesn't indicate how many came from each geographical location.

(Testimony of Edmund L. Smith.)

Q. This is intended to show just that there was one or more people out of a number which are going to get on the jury from each of these geographical locations and it doesn't purport to consider the extent to which or the size of the groups from each of these geographical districts?

A. No, but that can be ascertained.

Mr. Margolis: For what it purports to show, or for what it is worth, I have no objection.

The Court: Exhibit No. 6.

(The document referred to was received in evidence and marked Government's Exhibit No. 6.) [649]

* * *

The Court: Before you do, do you have a report here from the administrative office, Mr. Smith, in 1941?

Mr. Calverley: This may be the document that the Court refers to.

The Witness: This is the report that antedated the report of the Judicial Conference Committee in evidence under the green cover of September 1942.

The Court: What is the date of that?

The Witness: This letter from the Director of the Administrative Office is dated February 5, 1941.

The Court: Was that brought to your attention?

The Witness: Yes.

The Court: On or about that time?

The Witness: Yes, in connection with this report of 1942 which I have had for a long time.

(Testimony of Edmund L. Smith.)

The Court: Very well. Does the government want to offer this in evidence, or does anybody want to examine it?

Mr. Calverley: We will offer it, your Honor. We have no objection.

* * *

The Clerk: No. 7. [650]

(The document referred to was received in evidence and marked Government's Exhibit No. 7.)

* * *

Cross-Examination

By Mr. Garrett:

Q. The figures you gave, Mr. Smith, they were read rapidly. I didn't get all of them. I got only the figure of 266 for prospective jurors never called and never served.

A. That is correct.

Q. Is that the first of your figures?

A. That is the first column.

Q. And to what list of jurors does that figure relate?

A. It related to those cards which I stated I commingled with the cards that I took from the available box, available drawers.

Q. Those were cards direct from the jury commissioner's lists without benefit of questionnaires, is that right? A. That is right.

Q. When was that done?

(Testimony of Edmund L. Smith.)

A. I can ascertain the approximate date—I meant to have that here—by looking up the date I received index cards. It would be prior to that date. I had to make up an improvised index because I had no index cards. I would say within the last, oh, it was subsequent to September and prior to December. It must have been along in November or early part of December.

Q. 1946?

A. That is right. I worked on it in the evenings and on Saturday afternoons and at odd times.

Q. Now can you give me the second figure, the one following the 266 cards?

A. That list is of jurors called and excused or not served, 215.

Q. What was your next number?

A. Jurors called and served once, 208.

Q. What was your next number?

A. Jurors called and served more than once, 288.

Q. That is the last one, isn't it?

A. No, there is one more.

Q. What is the last one?

A. Jurors called more than once and served only once, 262.

The Court: Or a total of 1239 names in the box.

Q. (By Mr. Barrett): There is 1239 total?

A. Yes.

Q. Did you ask Mr. Donahue whether he would give you a set of those lists? [652]

The Court: You mean free?

Mr. Garrett: Free; for free.

(Testimony of Edmund L. Smith.)

The Witness: No, I didn't because——

Mr. Garrett: Just a moment, please.

Q. The answer is no?

A. That is correct.

Q. Isn't it a fact that the County Clerk, the Clerk of the Superior Court of Los Angeles County, receives a list of those, or a set of those free each time they are published?

A. That I have no knowledge of.

Q. Did you make any inquiry along those lines?

A. No.

The Court: Doesn't the state law require them to be furnished?

Mr. Garrett: I don't believe so.

The Court: I was under that impression.

Mr. Garrett: The point I am making is that Mr. Donahue would probably make a charge if these lists were furnished to a private agency, such as a person who prepares mailing lists, but the situation seems to be that as to public court officials requiring them the lists are given without charge by the County Registrar.

The Court: That is the state officials, I think you mean. I took it from Mr. Janney's testimony the other day when he broke down the costs, and Judge Kenny's questions, [653] that the idea was that the relationship was such that the County could get that list that they had, or even an old one, but it would require the payment of an approximate cost of securing each name, which as he testified

(Testimony of Edmund L. Smith.)

was \$2.30 roughly per name. So I suppose the same relation exists with the county. Maybe you can get them free.

Mr. Kenny: At the appropriate time I want to give my views on any impression that I might have given in that testimony.

Mr. Garrett: Just one more question:

Q. Is it not a fact that the list of registered voters is furnished by Mr. Donahue each time they are published, that is, once about every two years, free of charge to the Clerk of the Municipal Court for the City of Los Angeles?

A. That I have no knowledge of.

Q. Did you make any inquiry as to whether or not any charge was made for the furnishing of the lists used by the Superior and Municipal courts here?

A. I did not.

Q. Did you make any inquiry as to whether or not your office could obtain the list free?

A. I told him who I was, what it was for, and assumed, perhaps.

Q. Just what was it you told him? Will you give us the conversation just as you recall it, Mr. Smith, as to what [654] each of you said?

A. I said, "At the instance of one of our judges, Judge Hall"—I gave him my name and said first that "I am the Clerk of the United States District Court here and I would like to inquire from whom and how much a list of the registered voters for the County of Los Angeles would cost."

(Testimony of Edmund L. Smith.)

He stated that they were obtainable from the County and not a private printer, as I had believed, and that the list is only as of November of last year, and gave the number, 1,861,145, which he said was approximately 70 per cent of the registration and that upon my inquiry that it also included the half a million or more names stricken for not voting, and that a new list would not be printed until May of 1948; that the present list available does not include over 100,000 new registrations in the city of Los Angeles since the striking of the names, but he said that the half a million or more stricken, that of that number a great many would re-register from the same addresses or from other addresses to the extent of approximately 12½ per cent or better.

The Court: Where did you get this \$580? You haven't said anything about that yet.

The Witness: I thought I stated that in the beginning, that it would cost \$930.58. [655]

* * *

Cross-Examination

By Mr. Kenny:

Q. Mr. Smith, did you ascertain from the Board of Supervisors or any member thereof whether or not it is not a fact that it is their practice to give away copies of lists of registered voters for gratis to many worthy causes, shall we say?

Mr. Calverley: I am going to object to that as immaterial. I don't think there is any duty to go around and beg for these in order to have efficient

(Testimony of Edmund L. Smith.)

administration of the jury selection system here. What their practice may be have been I don't think is material here at all.

Mr. Kenny: Your honor, arguing to that objection, I think it is in an economy period such as we are in, if the Federal Government can obtain these lists free that it should try to do so. I am merely asking if Mr. Smith exhausted his opportunities of obtaining it for free.

The Court: I do not think he is under any obligation, nor is any official of the Government, to go around and beg for these things of the various officials. However, I have let everything else in so I might just as well let that in.

Mr. Kenny: I am not asking him if he begged, your Honor. I think your Honor and I can take judicial notice that you can get it for free if you know a member of the Board of Supervisors. [656]

The Court: And if they consider your prominent enough politically and it might swing a few votes in their direction, they might give you a list that had cost the County \$1000 or \$923, whatever it is.

Mr. Kenny: I think your Honor is assuming something not in evidence. The County already had the list, they had paid the money for it, it doesn't cost the County anything.

Q. You didn't inquire of the Board of Supervisors whether or not they would make a list available to the Federal Government?

(Testimony of Edmund L. Smith.)

The Court: Did you make any inquiry of any member of the Board of Supervisors?

The Witness: I did not. I assumed that we would have to pay for it as we do a lot of other things. We have had experience in the past, except where Federal judges in the past have been furnished, the same as the Superior Court judges, with sets of the California Reports.

The Court: You mean free?

The Witness: The Federal judges used to get them free. Now I don't believe they get them free any more.

The Court: I can state that they do not.

The Witness: For that reason, that I assumed that we would have to pay for it, that and other analogous things, I didn't make the inquiry. I thought that would come up later. [657]

Mr. Kenny: That is all. Thank you.

The Court: Thank you.

Mr. Smith, we have proceeded here informally. Do you have any statement you wish to make to clarify your testimony?

The Witness: May I have that report?

Mr. Margolis: In connection with that report, your Honor, merely because it is interesting in this connection. I would like to point out that on page 2 of Exhibit 7 of the report from the Administrative Office of the United States Courts, it is stated that in New York the registry lists of voters had at least prior to 1941 been the primary source of names for jurors——

(Testimony of Edmund L. Smith.)

The Court: Do you have any objection to the report?

Mr. Margolis: To it being admitted in evidence?

The Court: Yes. If not, I will admit it.

Mr. Margolis: I think it is an outmoded method of practice and it ought to go in.

The Court: All right. It is in evidence now.

Mr. Calverley: I believe the witness wanted to refer to that, your Honor.

Mr. Margolis: Excuse me.

The Court: In other words, I do not think this witness should make an argument. We let Professor Robinson make a few arguments but I think we ought to confine the witness' [658] testimony to evidentiary matters. If there is any argument to make on it the United States Attorney I think can make it.

The Witness: This report—I merely wanted to identify it for the purposes of the record—as stated, it was sent out by the Director of the Administrative Offices to all United States Circuit and District judges and perhaps to the clerks, if not all, and in it he states:

“It occurred to me that the information might be of interest to many of the District Courts and call the report to the attention of the Judicial Conference of Senior Circuit Judges at its recent meeting. The conference authorized me to send the report to all Circuit and District judges. Accordingly I transmit a copy to each of you herewith.”

(Testimony of Edmund L. Smith.)

Referring to the second paragraph on page 2, in explaining the system used, and apparently still presently in practice in the Southern District of New York——

The Court: Mr. Clerk, the whole report is in evidence and unless there is some particular or specific thing there that has a bearing on your conduct, other than the whole report, why I do not think that you should start to read from it. If you do we will be reading back and forth from that report all day. [659]

Q. (By Mr. Calverley): Mr. Smith, you received Government's Exhibit 7, did you not?

A. That is not my copy. That is one of the judge's copies.

Q. I noticed that it states it is the property of the chambers of United States District Judge Ben Harrison. Is that where you obtained it?

A. Yes.

The Court: I understood you to testify, however, that you did see it on or about the time it was issued.

The Witness: Yes, in connection with this other report, which it antedated. The other report is in evidence, that report of September 1942 I believe.

The Court: All right.

The Witness: There is one statement I might make. The reason for using these cards, since it has been inquired by the Court, using the available drawers, there is a list of jurors who mostly have qualified as competent and have served or not served

(Testimony of Edmund L. Smith.)

under the orders, statutes, state and Federal, from prior juries—involving lists of prior jury commissioners and clerks and under the direction of this court. It was therefore thought by me that it was a good source of competent, impartial and qualified jurors by eliminating as many as possible of the incompetent and those claiming exemptions. [660]

The Court: Do you have some more questions?

Mr. Margolis: Just a couple in connection with Exhibit 7.

Q. You have read and studied another copy of the documents which is in evidence here as Exhibit 7?

A. I have read a lot in connection with that same thing and this other report referred to dated September 1942. I haven't studied it, I might say. I have read it in the past.

Q. Has this report helped guide you in your work in the manner of selecting jurors?

A. It has helped guide me in avoiding a lot of—and it was discussed, that system was discussed at the time we inaugurated the questionnaires and the questions to be incorporated in that questionnaire.

Q. And you have attempted generally to follow the principles laid down in this report, is that right?

A. Generally speaking as to the questionnaire and eliminating the personal interview.

Q. How about the other matters in the report?

A. The former we haven't attempted to use.

Q. How about the matters as to the type of jurors that the report refers to as desirable?

(Testimony of Edmund L. Smith.)

A. I don't agree with that conclusion and entirely with the method at all. [661]

Q. Now this report says that in New York one of the greatest difficulties with juries has been that due to general economic conditions in New York the panel was overcrowded with relief workers and housewives. Another one was that most of the better quality of jurors was seeking to be excused because of the unfavorable physical surroundings in which they were required to serve and because they were called at times when it was impossible for them to leave their business activities. Have you had complaints of that kind from prospective jurors?

A. No.

Q. You haven't had that problem?

A. No.

The Court: You mean jurors haven't complained about being called away from their business?

The Witness: Oh, called away from their business.

Q. (By Mr. Margolis): How about other physical surroundings or perhaps having to associate with undesirable persons from the standpoint of some of the prospective jurors?

The Court: Does that report say that?

Mr. Margolis: Well, it doesn't but I think it is pretty implicit in the report.

Q. Aside from the report, have you had any complaint?

(Testimony of Edmund L. Smith.)

A. That refers to the condition prior to establishing that jurors' club room that they refer to in there. I don't know what the physical conditions of the court for the accommodation of jurors was prior to that.

Q. You haven't had that problem here at all, is that right?

A. Not to that extent at all.

Q. Have you had it at all?

A. Yes. When several juries have been out, or are waiting, witness rooms are crowded, jury rooms, or places to accommodate the juries. Of course I haven't heard any complaints that I recollect.

* * *

ARVIN H. BROWN,

recalled as a witness, having been previously duly sworn, was examined and testified as follows: [663]

Direct Examination

By Mr. Kenny:

Q. Mr. Brown, do you recall having been a witness in the case of United States v William H. C. Jackson, numbered 13999-M, in the records of the Clerk of this court, on the 24th day of July 1939?

A. I can't identify it by the name and the number or the date, but I remember being a witness in the case.

* * *

(Testimony of Arvin H. Brown)

Q. (By Mr. Kenny): I have before me here a clipping from the Los Angeles Examiner for the following day, and it might refresh your recollection of the event if I read this to you. This is the Los Angeles Examiner of January 25, 1939:

“Arvin H. Brown, Federal Jury Commissioner, stated he obtained the names of prospective jurors and trial jurors from various sources, including assessor's lists, personal property returns, bank personnel, telephone classified directories, various clubs and the Blue Book.

“‘Isn't the Blue Book a social register?’ Irwin asked (Irwin is Attorney John J. Irwin previously referred to in this news account).’

“‘Well, I understand anybody can get in it for \$3,’ Brown replied.”

Does that refresh your recollection of the incident?

A. Yes, it does. I was just going to say that I made that statement in a spirit of levity and hoped it would be taken that way, but I considered the Southwest Blue Book a very fine publication in its class. As I testified here, I think it would be classified as a social register.

Q. Now, Mr. Brown, do you recall any remarks that were made by Judge McCormick at that time regarding your use of the Blue Book or of club registers?

A. No, I don't.

* * *

(Testimony of Arvin H. Brown)

The Court: Do you recall whether or not he did say anything?

The Witness: You mean about the use of these things?

The Court: Yes.

The Witness: I don't recall anything.

The Court: Did Judge McCormick ever tell you not to use the Blue Book?

The Witness: Oh, no. I think I would have remembered that because I don't think the judge has ever suggested to me about not using lists.

The Court: Now you testified the other day that you got names in 1943, and then you testified you had used the Blue Book once before? [665]

The Witness: Yes, sir.

The Court: But that you didn't remember the year. Now in view of this question by counsel, is your recollection now refreshed as to whether or not that is the year you used it or a previous one?

The Witness: No, I feel that that was a statement that I was making covering my tenure of office from the beginning up to that time.

The Court: I see. All right.

Mr. Kenny: Just one other question, Mr. Brown.

Q. The question I asked you included the reference to your use of lists of bank personnel?

A. That is right.

Q. Can you tell us just what use was made of lists of bank personnel?

A. What use?

Q. Yes, or what list you obtained and what you did with it in the practice during that period.

(Testimony of Arvin H. Brown)

A. I thought of the idea of getting some of the tellers and employees of the bank that would not be key figures, and I was able to get a list from one of the banks in town covering that. I took the list to the clerk—it was Mr. Zimmerman, I believe; it was before Mr. Smith—that was quite a number of years ago, and turned it over to him. [666]

Mr. Kenny: Thank you.

The Court: Is that all?

Cross-Examination

By Mr. Calverley:

Q. Mr. Brown, you testified that you obtained a great many of these names from the Los Angeles telephone directory. I have the current issue of that directory in my hand, November, 1946. This is the type of directory you used in making the selections?

A. It is, but it might not be that year.

Q. But it is published by the Southern California Telephone Company?

A. That is right.

Mr. Calverley: I will offer this as a Government's exhibit, as indicative of the source from which Mr. Brown obtained the bulk of his names.

Mr. Margolis: No objection.

Mr. Garrett: I am going to object to that offer on the ground it is incompetent, irrelevant and immaterial. I believe that the use of that directory is apt to be purposely misleading—or rather misleading without the purposely—there is no testimony that this particular directory published at the end of 1946 was ever used. This directory is,

(Testimony of Arvin H. Brown)

as everyone knows and there has been public comment on it and announcements by the telephone company as a result of it, [667] this directory is, as everyone knows, approximately one-third larger than any telephone directory ever published in this area before it, or any telephone directory ever used by this witness.

Your Honor will recall that the telephone company has announced that on account of the size of this new directory that it is contemplated that district directories will be used in the future.

The Court: It is only offered for the type, just the same as the defendants offered the Southwest Blue Book of 1947 for the type. Is that what your purpose was in offering the Blue Book, Mr. Margolis? It was for the type, and it wasn't for the names?

Mr. Margolis: I understood that to be the purpose, and not to indicate the size.

The Court: It was your purpose in the Southwest Blue Book to indicate as to the type of the book?

Mr. Margolis: Yes. And I stated I have no objection to the telephone directory, your Honor.

The Court: All right. The objection is overruled. It is admitted in evidence.

The Clerk: No. 8.

(The telephone book referred to was received in evidence and marked Government's Exhibit No. 8.) [668]

* * *

Mr. Margolis: * * *

I want to say that the defendants have pleaded not guilty, which puts of course all of the allegations of the indictment in issue, but at this time the defendants, for the [670] purposes of this motion or for the purpose of these proceedings generally, admit that each of the defendants are members of the—at least I am making this on behalf of the defendants we represent—International Fishermen & Allied Workers of America. That is not true with regard to the defendant Mr. Garrett is representing.

I also want to draw your Honor's attention to two other things. At this time, your Honor please, so that the record may be entirely clear, I want to re-offer each and every exhibit and every part of every exhibit which has been marked for identification and has been offered by the defendants but which has not yet been admitted in evidence.

* * *

I assume that your Honor still wishes to reserve ruling on the matter?

The Court: Yes.

Mr. Margolis: I also want to ask leave at this time to amend the motion in certain particulars. I might state that it is amended from our viewpoint to conform to the proof. At the time that the motion was originally prepared we did not have all of the exhibits that we are offering now.

I ask to amend the motion, or ask leave to amend the motion, by inserting on page 2, line 5, of the notice of motion, immediately following the word

“laborers” the following words, “operatives and kindred workers, domestic workers, service workers.” That is the end of that insert.

Then on line 6 to insert immediately following the words “members of labor unions” the words “Americans of Mexican descent.” That is the end of that insert.

Then on line 7 of the same page, immediately following the words “and were excluded from” the words “and that proprietors, managers and officials were systematically and intentionally favored in.”

I offer these amendments either by way of insertion or, if the order is granted, I will be glad to file an amended motion so that it will not be necessary to—I think that the motion can be clear and easy to follow, or I can write it in, if the motion is granted, whichever the Court prefers. I do not have at this time prepared a typewritten amended motion.

The Court: Well, ordinarily I do not see any objection to the granting of motions to amend. I would not want to be understood, however, in granting the motion to amend on the ground that it was granted to conform to the evidence.

Mr. Margolis: I understand, your Honor. I merely made that statement. At the time this motion was prepared we did not have all of the information that we have now. [672]

The Court: Is there any objection to it?

Mr. Calverley: Your Honor, we don't feel that this motion to amend is timely made. The motion itself was filed late, and this amendment opens up matters that we received no warning of before the

motion was filed, and it so happens that as a result of this inquiry that certain matters were gone into indirectly that are not mentioned in the motion itself.

The Court: Yes. I think there is something to that. You want to add domestics—what was that—operatives, service workers and domestic workers?

Mr. Margolis: Operatives and kindred workers, domestic workers, service workers. That is on line 6.

All of these matters having been gone into, I can't see how counsel can claim that there is any surprise.

The Court: Operatives and kindred workers, domestic workers?

Mr. Margolis: And service workers.

The Court: And service workers.

Then members of labor unions, Americans of Mexican descent?

Mr. Margolis: That is correct.

The Court: What was the other? Systematically and intentionally discriminated against and were excluded from the list of persons? [673]

Mr. Margolis: Immediately after the word "from" on line 7, your Honor, and that proprietors, managers and officials were systematically and intentionally favored. It is merely the other side of the coin.

The Court: Well, counsel for the Government in asking his question of both Mr. Smith and Mr. Brown limited his interrogation to the bases of your allegations here, as I remember. He asked them whether or not they had included in these members of labor unions. He did not broaden out the field as

to the others. There is testimony in the record as to what they have done, whatever they have done in so far as the gathering of the lists is concerned, but in so far as they might be enabled to prepare to controvert whether or not they systematically and intentionally discriminated against operatives and kindred workers, service workers, domestic workers, and Mexicans of American descent, that is a new charge.

Mr. Margolis: I am perfectly willing to stipulate, your Honor, that both Mr. Smith and Mr. Brown would receive, if they were asked the questions, that they had no intention or purpose in discriminating against any of the groups or in favor of any of the groups.

The Court: I don't know that that would cure it in the present state of the record. For instance, as to Negroes you asked, and I think somebody asked Mr. Brown, and also [674] about Japanese, what he did. He went down to a Negro preacher.

Mr. Margolis: He was asked what he did about Mexicans—I asked him myself—and he said he didn't do anything especially about them. He didn't know of any organization.

Now the point with regard to operatives and kindred workers, domestic workers and service workers was all offered in our exhibits. Of course I do concede that counsel is at a disadvantage because it hasn't been determined yet whether or not those exhibits will be admitted.

But assuming that those exhibits are admitted, there certainly has been—we have put on proof on

these points and, as I understand it, there is no intention, assuming that the exhibits are admitted, to controvert or to attempt to controvert those exhibits by any other evidence. Actually I have done this out of perhaps an excess of caution in order that the motion may be entirely clear.

The word "laborers" could well be taken to include many of these categories. I merely am using the terms which the census bureau has used in order that my motion may conform with the terms that were used here. I think actually that the terms are broad enough probably in one sense to include all of these categories, yet they are not the specific terms where they are used as terms of art by the census bureau which have gotten in here into evidence in that connotation. [675] I want my motion to be entirely clear. I think if we had not used those terms of art in the census bureau that my motion would be clear as covering all of these categories of workers.

The category, members of labor unions, we know, your Honor, that members of labor unions are concentrated, at least as far as the CIO is concerned, in the mass industries and those are the operatives and kindred workers. I don't think anybody would be misled by this original motion and the original purpose of this, as I say, is because in the course of this presentation certain terms of art were used, terms of art used by the census bureau, used scientifically, and I wanted the motion to be entirely clear with relations to those terms of art.

Mr. Calverley: If the Court please, we feel that counsel is attempting to broaden this motion beyond all justification. In so far as any surprise is concerned, the classifications used by the census was brought out in the testimony of the witness, and that there are people of low incomes in many of these classifications. They seem to cut across classifications, and those at the bottom, in Class K for example, do not include all of the low income groups at all. Also the membership in labor unions cuts across the eleven major classes.

The Court: I think that your motion as made is probably broad enough to frame the issues here that have been mentioned. [676]

Mr. Margolis: I think it is, your Honor, and, as I say, just because these terms have been used, I think that in the event the matter should ever go up that it would simply relate the motion to the evidence and the terms that have been used and I think it would clarify the record. I think it would be of assistance to everybody.

* * *

The Court: I would like to follow the policy of allowing as liberal pleadings as can be done, but I think that your motion is broad enough to frame the issue, and if this is included it will narrow the broader issues that you have into issues which the Government would be justified in asking permission to re-open.

Mr. Garrett: The Government hasn't put on their case yet. [677]

Mr. Margolis: The Government hasn't put on their case. I am making this motion at the close of our case, not at the close of the Government's case.

The Court: I understood that the Government was through. Have you any witnesses?

Mr. Calverley: We don't expect to call any.

Mr. Margolis: We haven't closed yet. It is a matter of the Government's own choice. The Government hasn't started yet. Maybe the Government will be through before it starts. But as far as we are concerned, we have not yet rested and the Government will have every opportunity to meet this.

Mr. Dixon: We understood that he had rested, your Honor, subject to argument.

Mr. Margolis: I said I had two or three things that I wanted to do before I rested. [678]

* * *

JOHN J. IRWIN

called as a witness by and in behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: John J. Irwin; I-r-w-i-n.

Direct Examination

By Mr. Garrett:

Q. Is that a file on the Jackson case before you, Mr. Irwin?

A. It is, Mr. Garrett.

Q. While you have it before you, will you inspect it, Mr. Irwin? [679]

(Testimony of John J. Irwin.)

A. I looked it over the other day with you, Mr. Garrett, last Friday. I am familiar with the contents.

Q. Will you state your name and occupation?

A. John J. Irwin, I-r-w-i-n, attorney at law; address, 5658 Wilshire Boulevard, Los Angeles.

Q. Are you licensed to practice in this court, Mr. Irwin? A. I am, sir.

Q. For how long have you been so licensed?

A. For 14 years; 1932.

Q. Do you recall this case of *People v. Jackson*, Mr. Irwin? A. Very well.

Q. Did you represent any of the parties there?

A. I was appointed by the court to represent William H. C. Jackson. I might state that that was the second case in which I had been appointed to represent him. There were two cases.

The Court: Same man?

The Witness: Yes, sir.

Q. (By Mr. Garrett): That file shows you presented a motion in the form of a challenge to the trial panel in that case. Will you inspect that motion or challenge and see if you can identify it in the file? [680]

A. I can. I looked it over again and I now look at it and that motion to quash the indictment, consisting of two pages, with my signature—it is my signature—was prepared and filed by me in this court. It is Case No. 13999-M.

Mr. Garrett: May it be admitted by reference, your Honor?

The Court: Admitted.

(Testimony of John J. Irwin.)

Q. (By Mr. Garrett): Now, Mr. Irwin, we had a conversation, if you will recall, concerning certain proceedings which were had upon the hearing of that challenge to the panel. I might state for your information to Mr. Kenny and I have represented to the Court that since that conversation with you we had last Friday, or last Thursday, we have had the notebooks of stenographic records searched by the reporter in that courtroom at the time of the hearing I am referring to, Mr. G. M. Fox, and he has been unable to locate his notes on that hearing. It was before Judge McCormick. The record shows that Mr. Brown, jury commissioner, was examined. Do you recall that, Mr. Irwin.

A. Very well, Mr. Garrett.

Q. Does the record show whether or not Mr. Zimmerman was examined?

A. I don't know, but I recall definitely that he did testify, as did Mr. William Fleet Palmer. [681]

Q. Do you have a recollection of the testimony that was given and the observations of the Court in connection with the motion on that day?

A. Since this happened so long ago, and, as Court and counsel know, attorneys have a great many matters, would it be pertinent to say why I recall this particularly, your Honor?

The Court: No.

The Witness: Shall I proceed directly?

Q. (By Mr. Garrett): You do have a recollection, do you, Mr. Irwin?

A. I do; yes, sir.

(Testimony of John J. Irwin.)

Q. Had you been prior to the trial of this case in any official position in this Division?

A. In this District, you mean?

Q. In this District; yes.

A. Yes, sir. I was Assistant United States Attorney in 1933 to 1937.

Q. And this Jackson case, the incidents of that case were how long from your departure from the United States District Attorney's office?

A. About two years.

Q. It was two years? A. Yes.

Q. For some reason or other you remember the case, do you? [682]

A. I do; yes, sir.

Q. You haven't got the benefit of the stenographer's notes here, Mr. Irwin, and we would appreciate your telling us the best of your recollection just what happened here.

A. This William Jackson was his true name. The reason I remember him, he was also known as Haifi Tashira, and he claimed to be the prophet of the Lost Tribe of Israel. He was a colored gentleman, and there was the first indictment charging perjury in connection with matters pending before the immigration authorities. That was before Judge Hollzer. He called me and asked me, because of the nature of the matter, if I would act in the case, which I did.

Then this indictment was returned charging him with violation of the Mann Act, after we acquitted Mr. Tashira before Judge Hollzer. I was appointed

(Testimony of John J. Irwin.)

in that case, in this current case, and after going into it in some detail I decided to file the instant motion.

I prepared subpoenas duces tecum in support of it, arranged for the appearance of the jury commissioner and the clerk, to support the motion, and there was testimony had before Judge McCormick.

Do I understand your question as it is now framed comprehends my giving the substance of what was testified to at that hearing?

Q. As you recall it, Mr. Irwin; yes. [683]

By the way, before you go into that, the subpoena duces tecum you have referred to is in the file there, is it not?

A. I see an order granting the subpoena dated July 21; yes, sir.

The Court: Who is it directed to?

Q. (By Mr. Garrett): Are the papers required by that subpoena duces tecum, were they produced, Mr. Irwin?

A. First may I answer your Honor's question. It was directed to R. S. Zimmerman, Clerk of the United States District Court, Arvin H. Brown, jury commissioner. I had asked to get certain other people, which Judge McCormick declined and struck out. Those were the only two granted.

It is my recollection that I asked for the production of records showing the manner in which the jury panel was selected in this District.

Q. Now those papers, were they produced in court, as far as you recall?

(Testimony of John J. Irwin.)

A. My recollection isn't so clear as to what was produced by way of records as to what the testimony was of Mr. Brown and Mr. Zimmerman. That I shall never forget.

Q. Will you please state, according to your recollection, what that was?

Mr. Calverley: If the Court please, I think this is going pretty far afield. I object to it on the ground it is [684] incompetent, irrelevant and immaterial.

The Court: What is the purpose of it?

Mr. Garrett: It is testimony, your Honor, please, on precisely the same point on which testimony had been offered by both of the named witnesses in this cause before you and relating to the same matter.

The Court: Is it contrary to their testimony?

Mr. Garrett: I represent that it is.

The Court: All right. Objection overruled.

* * *

The Witness: In seeking to support the motion, questions were propounded to Mr. Brown and to Mr. Zimmerman which elicited in substance the information that the jury panel for this court was selected by reference to the membership lists of athletic clubs, country clubs, particularly do I recall reference to the Blue Book and similar types of organizations here in Los Angeles.

Then I recall in opposition—the motion was denied—I recall in opposition Mr. Palmer testified that he had a recollection that there had been at some time in his service a colored person on the

(Testimony of John J. Irwin.)

jury, and the motion was denied, and I recall that the comment from Judge McCormick was that the manner of selecting the jury certainly was open to criticism and should be corrected. [685]

Mr. Garrett: No further questions.

Mr. Calverley: If the Court please, I move to strike this witness' testimony on the ground that there hasn't been any impeachment here of anything that has been heretofore testified to.

The Court: No, there hasn't.

Mr. Garrett: I desire to point out——

The Court: Have you stated all of Mr. Brown's testimony? Is that the only place he testified he got the names from?

The Witness: Let me see, your Honor. I will try and be as complete as I can.

As I recollect, if your Honor will recall my motion was directly mainly because of the colored situation—it was a colored party—and my recollection was that they said that they got them from the clubs, he mentioned the clubs, and as I say, that Blue Book.

The Court: Did he mention the telephone directory?

The Witness: I believe—let's see—I wouldn't say he did not. That is as I recall what he testified to.

The Court: Why don't you refresh the witness' recollection with this newspaper article that you read?

(Testimony of John J. Irwin.)

Mr. Garrett: I shall be pleased to do that, your Honor? [686]

* * *

The Court: I think it may be admissible, but I doubt whether it is impeachment. However, we can't come to that at the present time. The objection to the testimony will be overruled.

* * *

Mr. Garrett: Your Honor suggested that I show this newspaper article to the witness. I would like to have his [687] unassisted recollection first, however, and I would like to ask at this time, your Honor, of the witness, whether the witness has any further independent recollection of the statements made either in evidence by the witnesses or from the bench by Judge McCormick.

The Witness: The testimony that I have given, Mr. Garrett, is substantially my recollection of what transpired at that time.

The Court: What did Mr. Zimmerman testify to?

The Witness: As I recall, Mr. Zimmerman testified, your Honor, to the manner in which Mr. Brown and himself got together and——

The Court: Did he testify where he got the names or did he testify as to whether or not he got any names?

The Witness: It is my impression, sir, that Mr. Brown was the one who came up with the names as a jury commissioner——

The Court: Not your impression.

(Testimony of John J. Irwin.)

The Witness: It is my recollection, sir, and I could be wrong, that it was Mr. Brown who supplied the names and that he and Mr. Zimmerman sat down together and went over the names and from that group lists were selected which were put in and from that certain numbers were withdrawn.

Q. (By Mr. Garrett): Now, Mr. Irwin, with the hope of eliciting any [688] further recollection that you may have, I am going to show you a current newspaper article that we have here, evidently taken from the local press as of July 25, 1939. I will indicate that article, Mr. Irwin. It is before you now.

A. Are you referring to what appears to be a book of clippings?

Q. Yes, that is right. We got that from the press room.

A. The article entitled "Prophet Held for Trial on Slave Charge," is that right?

Q. Yes.

A. It appears to be page 81 of this book.

* * *

Q. Will you read it over and see whether after reading it over your recollection is refreshed so that you are able to testify to any further evidence or statements made at the hearing in that case concerning which you testified?

A. I have read the article, Mr. Garrett.

Q. Does reading of that article refresh your recollection in any way?

(Testimony of John J. Irwin.)

A. It does to a certain extent, that is to say, that it broadens my recollection as to the sources of where Mr. Brown testified he got his names from, and this quote of [689] Judge McCormick's, that is not all-inclusive.

Q. You mean to say that Judge McCormick said other things besides those quoted in that newspaper article?

A. As I have testified, and that is my recollection.

Q. Now after reading that article and refreshing your recollection, can you testify any further as to things not mentioned by you before but recollected by you now?

A. Yes. I think I should say, Mr. Garrett, that I do not recall, having looked at this article, that Mr. Brown testified that in addition to the sources of information, that names were secured by reference to the assessor's lists, of personal property returns, which I understand is people who make returns of securities, and so forth, bank personnel, telephone classified directories—I have testified to clubs and blue books. So I think having looked at this I should amplify my testimony that I do now recollect that he did say that those various sources of information were referred to.

The Court: Did he say when he got these names from the clubs, how recently prior to 1939?

The Witness: My recollection, your Honor, is that it was a continuing proposition, that every so often they sat down. In other words, some people

(Testimony of John J. Irwin.)

died and they had to use those lists for years, as I understood it, from time immemorial.

The Court: But that he went to the clubs and just kept [690] on year after year, or do you recall what he testified to as to that?

The Witness: As to how often he referred to them? I do not.

The Court: You do not?

The Witness: How often he went to them? No sir.

The Court: Does that refresh your recollection about anything else that Judge McCormick said, or is that material to this inquiry?

Mr. Kenny: I think that is the principal, at least for our clients, we think that that is the most material on the theory that the jury commissioner is already on notice of the criticism of this court.

The Court: I think perhaps I can say now that any judge can say tomorrow, or as to anything that we could do, any judge could sit down and say that the methods of picking jurors could be improved, and when the time comes when no judge is able to say that why then we will have reached a static point in our society that it will break, whenever we reach the point that we can't improve.

Mr. Kenny: But, your Honor, this witness was told that the things he was doing then could be improved and he didn't improve them, he remained static. That is the point of this testimony.

The Court: We will have to argue the evidence in that case later. [691]

(Testimony of John J. Irwin.)

Mr. Garrett: As to the witness, your Honor, I think I should ask whether any further recollection remains in his mind, and I do ask that, Mr. Irwin, beyond what you now have told us.

The Witness: I have nothing to recollect except what I have added after looking at this article.

Mr. Garrett: Your witness:

Cross-Examination

By Mr. Calverley:

Q. Mr. Irwin, do you recall any testimony by Mr. Brown or Mr. Zimmerman as to the portion of names obtained from the telephone directory or from these clubs?

A. I do not, Mr. Calverley. It was the net result that sticks out in my mind. The exact proportions I do not know.

Q. Do you recall whether or not Judge McCormick directed the jury commissioner to make any change in his method of selection?

A. Thus far back I wouldn't want to say positively. I certainly don't want to quote Judge McCormick.

Q. To the best of your recollection, that he commented to the effect that the method could be improved because it was subject to some criticism?

A. And that the scope should be enlarged, that is my [692] general impression, to include people in all classes and walks of life. I noticed that at the next term of court they had some colored people on the grand jury.

(Testimony of John J. Irwin.)

Q. You testified to personal property returns, having reference to persons who had securities. Do you recall any testimony as to whether or not they had securities or just personal property returns on furniture or anything else that a man might have?

A. I think your question is probably put better than I did it. I think as it appears here in this quote it was probably the exact way that it was, assessor's lists of personal property returns.

* * *

Q. Now you have refreshed your recollection of Judge McCormick's comments from the comment appearing in that newspaper, is that right?

A. Well, my first testimony was my independent recollection, sir. I have read that article subsequently and I agree that that quotation was made by Judge McCormick, but as I stated I don't think that the quotation is all-inclusive. It included the remarks that I have just said to you, that it should be broadened and could well be the subject of criticism. In the instant case he said that there was no discrimination [693] and he denied the motion.

Mr. Calverley: May we have that quotation, your Honor, Judge McCormick's comments?

The Court: Do you want me to read it, Mr. Calverley?

Mr. Calverley: Yes.

The Court: Reading from a portion of the article heretofore identified by counsel and the witness:

(Testimony of John J. Irwin.)

“After hearing testimony, Judge McCormick said, ‘There has obviously been no discrimination or exclusion whatever in drawing the names of prospective jurors. Unless there should be something to indicate a substantial deviation from the rights and privileges guaranteed to all persons under the Constitution, it seems to me there is no merit in the defendant’s contention’. ”

Mr. Calverley: That is all.

Mr. Andersen: It is understood that the discrimination there referred to Negroes, your Honor.

* * *

Redirect Examination

By Mr. Kenny:

* * *

Q. Now that this has been read in the record, I wonder if that brought to his mind just what Judge McCormick said in that connection.

A. That is right. After this quote here, I recall his stating, in substance, that he thought that it could well be broadened and it might be the subject of criticism and that it should be broadened to include a more general representation of the citizenry of Southern California, something to that effect. That is my best recollection.

* * *

Mr. Margolis: I renew my motion now to amend.
The Court: The motion is denied.

* * *

Mr. Calverley: If the Court please, there are a number of exhibits here that are not in evidence and we have objected to their introduction. I am referring to Exhibits W-1, X-1, X-2, Y-1, Y-2, Z-1, Z-2, AA-1, AA-2, BB, CC-1, CC-2, DD-1——[695]

The Court: Down to II.

Mr. Calverley: Down to II, as appearing on the list that the Clerk has given me. We objected to the introduction of those exhibits on the ground that there was a lack of foundation. We at this time move to strike the testimony of the witness Robinson on the ground——

The Court: As to those exhibits?

Mr. Calverley: As to these exhibits, your Honor.

The Court: Only not limited to anything else.

Mr. Calverley: As to these exhibits only, on the ground that these exhibits are not records kept in the usual course of business, they are made by an individual under his direction who, he testified, was employed by defense counsel. The figures contained in these exhibits were not personally prepared by the witness himself. He testified that he relied upon what was told him by others.

Therefore as to these exhibits, the testimony of the witness Robinson would be hearsay based upon hearsay. For that reason we feel that there is a lack of foundation.

Also we renew the ground previously stated, that the witness did not make any examination of the basic source from which these names were obtained, namely, the 25,000 or 30,000 names which remained in the files of the clerk from which the names of prospective jurors were drawn. [696]

Also, if the Court please, we believe that the remaining testimony of the witness Robinson should be stricken on the ground that it is incompetent, irrelevant and immaterial, in that it is an attempt to approach this problem by a process of deductive reasoning, going from effect to cause, which was not the procedure followed in the case of Thiel v. Southern Pacific Company. And it is our view that the case of Smith v. Texas relied upon by the defendants in support of this method of approach, namely, the deductive approach to the problem, is not in point for the reason that, as has heretofore been indicated, Smith v. Texas was a racial problem wherein the Fourteenth Amendment to the Constitution was involved. In this case and in the Thiel case it was simply a matter——

The Court: One was the equal protection clause of the Fourteenth Amendment.

Mr. Calverley: That is correct.

The Court: There is no equal protection clause in the first ten amendments or in the Constitution as far as the Federal Government is concerned.

Mr. Calverley: And the requirement of the Constitution being only that the jury be impartial. The designation in the Thiel case that a jury should be selected from a cross-section of the community is based upon good administrative procedure in the Federal Courts, inconsistent with American ideals, and not because of the Constitutional rights of the persons involved, because in that particular case it apparently was immaterial that the actual jury selected contained five individuals who were in sym-

pathy with the economic group in which the appellant belonged. Therefore we feel that this evidence, a deductive process of reasoning, doesn't apply where you do not have a constitutional question.

Now counsel has indicated that there is a constitutional question involved in this case because the defendants are in the class discriminated against, as Smith was in *Smith v. Texas*. But that, as I have indicated heretofore, is an issue in this case, because in paragraph 11 of the indictment it is contended that they are not laborers but are in fact proprietors and independent businessmen.

Mr. Margolis: Your Honor, I would like the opportunity of answering all of that in the course of my argument on this matter rather than take it up piecemeal at this time. I intend to go into all of those questions.

The Court: The question is on the objection to the introduction of the exhibits and on the motion to strike all of the witness Robinson's testimony.

Mr. Margolis: I suggest, your Honor, that a ruling might be reserved until we have had an opportunity to argue the whole matter.

The Court: No, I think I am prepared to rule on it now.

Mr. Garrett: May I be heard, your Honor, if the matter [698] is to be decided today? I am under a necessity of making an appearance, if your Honor please, in the Superior Court this afternoon and if there is to be a ruling——

The Court: I think pretty nearly everything has been said in connection with the admissibility of this testimony and of these exhibits.

Mr. Margolis: I want to say, your Honor, that I haven't even purported to present the argument which I do have on this matter.

The Court: On the admissibility of his testimony?

Mr. Margolis: Yes, your Honor. I think that all of these points which counsel has raised here require an extended discussion of the law. I submit that the analysis of the law which has been made is just as inconsistent with the cases, when they are actually analyzed, not merely a few sentences superficially read, and the reason that I don't want to argue this objection separately—although I will do so if your Honor wants me to, or will permit argument on it—is because the presentation of this argument requires an analysis of all the cases on the subject and of the entire subject that we are talking about, and could better be presented as part of the entire argument on this subject.

However, if your Honor wants the argument on it separately, I think we should have an opportunity to present our argument, and I will say that the argument will be fairly extensive because it will not be based upon reading one or [699] two sentences from one case, but upon an analysis of all of these cases and what they mean with relation to the facts of the cases, an analysis of both the majority and the dissenting opinions in these cases, and we also take the position, your Honor, that there is a constitutional question involved here. We are prepared to argue that at considerable length.

Now all of these matters go to the very heart of the objection.

The Court: As I was about to say, and as I indicated at the commencement of this hearing, the Supreme Court by its Thiel case and by its opinions in the Ballard case and the Glasser cases, has left the matter rather up in the air as far as procedure is concerned in the lower courts. The matter is not covered as to rules. There isn't any clear or definite or ascertainable or easily ascertainable standard as to what is relevant or material on such an inquiry as this in any of the proceedings nor in any of these decisions, nor is there any statute which can be found upon the subject which the Supreme Court followed or relied upon.

The basis of their opinion in the McNabb case, which they relied on in the Ballard case and in the Thiel case as well, was not that there were violations of a rule, violations of a law, a deprivation of any constitutional right, but merely in the exercise of their power of supervision over the administration of justice in Federal Courts they saw fit to conclude in the Glasser case that there was no injury and that the man was not entitled to a reversal because there was an exclusion of a class, or rather the exclusion solely of one class, and they saw fit in the Thiel case to reverse a decision because, as they said, there was an exclusion of an economic class, and in the Ballard case because they said that men and women are not fungible.

In that connection, they apparently considered that a book was material in their decision and was

competent for them to consider because in connection with their decision they refer to a footnote:

“The problem is reflected in the discussions of the androcentric theory and the gynaeocentric theory in scientific literature. See War, Pure Sociology (1903), Ch. XIV; Draper et al., Human Constitution in Clinical Medicine (1944), Ch. VI.”

So I cannot find any statute which gives them the power of supervision over the administration of justice in Federal Courts in matters such as this. They have the power to prescribe rules, but they didn't prescribe anything in the rules, although they promulgated the rules after the decision in the *Glasser* case.

Also I cannot find anything, there being no statute, I cannot find anything in that statute to prescribe a boundary where I am to begin or to leave off, as to what they will [701] consider or what they will not consider, as to what is material and what is immaterial. And if these pamphlets and literatures on the gynaeocentric theory and the androcentric theory are material when the case finally gets to the Supreme court, I think howsoever slightly it might have to be regarded in so far as the weight of the testimony of Dr. Robinson is concerned—and I have serious doubts as to its having any probative value—I will have to conclude that nevertheless it is admissible. I will therefore overrule the objection as to the introduction of the exhibits and deny the motion to strike all of Dr. Robinson's testimony.

Now in that connection, I am mindful of the statement that I again read last night, where some elderly man said to a young man, "When you get to be a judge, your conclusions will probably be right, but your reasons will be wrong so do not state your reasons."

However, I have practiced law too long and I would like to give counsel the benefit of what is going on in my mind.

Mr. Margolis: I wanted to ask this, your Honor: Does that ruling mean that all of the exhibits that have been offered are now admitted?

The Court: Every exhibit that has been offered is in evidence. All of the testimony is in evidence.

(The following exhibits previously marked for identification were received in evidence:

Defendants' Exhibit D,
Defendants' Exhibit E,
Defendants' Exhibit W-1,
Defendants' Exhibit W-2,
Defendants' Exhibit X-1,
Defendants' Exhibit X-2,
Defendants' Exhibit Y-1,
Defendants' Exhibit Y-2,
Defendants' Exhibit Z-1,
Defendants' Exhibit Z-2,
Defendants' Exhibit AA-1,
Defendants' Exhibit AA-2,
Defendants' Exhibit BB
Defendants' Exhibit CC-1,
Defendants' Exhibit CC-2,

Defendants' Exhibit DD-1,
Defendants' Exhibit DD-2,
Defendants' Exhibit EE-1,
Defendants' Exhibit EE-2,
Defendants' Exhibit FF-1,
Defendants' Exhibit FF-2,
Defendants' Exhibit GG-1,
Defendants' Exhibit GG-2,
Defendants' Exhibit HH-1,
Defendants' Exhibit HH-2,
Defendants' Exhibit II,
Defendants' Exhibit JJ,
Defendants' Exhibit KK.) [703]

* * *

Los Angeles, California, March 12, 1947;
10:00 o'Clock a.m.

OPINION OF THE COURT

The Court: The defendants' motion to dismiss the indictment and their challenge and motion to strike out the entire trial jury panel are both based upon the same grounds. In view of the fact that the February 1946 grand jury which returned the indictment and the current trial jury panel were chosen from the names selected in the same method and manner by the jury commissioner and the clerk, the stipulation that the two motion might be heard together was approved.

Briefly stated, the contention is that the grand jury for the February 1946 term and the present trial jury panel were drawn in such manner that

the grand jury was "not an impartial grand jury" and that the trial jury panel was not "an impartial jury panel drawn from a cross-section of the community, but that certain defined groups of the community, to-wit: laborers, people working by the day or hour, members of labor unions and Negroes were systematically and intentionally discriminated against, and were excluded from the list of persons to serve" as grand jurors and trial jurors. It is further asserted that they were deprived of their right to an impartial grand jury and an impartial trial jury "without such exclusion and discrimination as against groups and [3*] classes of persons to which defendants belong."

While it might appear from the wording of the motion and the affidavit of one of the counsel filed in support of the motion that there was a willful and deliberate intent on the part of the clerk and the jury commissioner to effect such an alleged discrimination, it should be stated at this point that after the conclusion of the evidence and during the course of the argument Mr. Margolis, of defendants' counsel, stated that the defendants did not want anything in the argument or in the presentation of the evidence to indicate that they intended to impugn the motives or the desires of either Mr. Brown, the commissioner, or Mr. Smith, the clerk, and that there is nothing in the record which shows anything from the standpoint of personal motivation of either of them.

* Page numbering appearing at top of page of Reporter's certified Transcript of Opinion of the Court.

Be it also said that counsel for the defendants, in support of their motion, instead of limiting their tactics to merely an attack upon the methods used, have very commendably sought to produce by evidence and in argument suggestions which were calculated to aid the officials of this court charged with the very difficult task of selecting jurors, to find a better way than the one under assault.

It should also be stated that this is not a usual proceeding. So far as I can ascertain from the records of this court, of which I take judicial notice, only twice before has a challenge recently on somewhat the same grounds been made, [4] once in 1924 and once in 1939. From the records it appears that upon each of these occasions the motions were denied and no appeal taken. Such proceedings were, however, before the series of cases recently promulgated by the Supreme Court beginning with the case of *Smith v. Texas* (1940) 311 U. S. 128; *Glasser v. United States* (1942) 315 U. S. 50; *Hill v. Texas* (1942) 316 U. S. 400, and its companion case *Akins v. Texas* (1945) 325 U. S. 398, and culminating with *Thiel v. Southern Pacific* (May 20, 1946) 328 U. S. 411 and *Ballard v. U. S.* (December 9, 1946) 91 L. Ed. 922, 328 U. S.—.

The defendants contend that it is the rationale of those cases, not only that the deliberate and intentional exclusion by the clerk or the jury commissioner of persons having common characteristics by virtue of their employment, or their method, time or rate of pay, or religion, race, political, geographic location, or associations in social intercourse, is un-

lawful, but also that the use of a method or system of selection which, without intention so to do on the part of either of those officers, results in the exclusion of any such group having common characteristics is likewise unlawful.

They further contend that the use of any method, process or system of selection which results in the over-weighting by a larger percentage of one occupation than another among the actual jurors selected of persons from one group or "class" is likewise unlawful. The latter contention is more clear [5] if it is stated specifically. It is, that an "economic class" (arbitrarily designated by the defendants as proprietors, managers and officials) constitute more than 50 per cent of the grand jury and the trial jury panel under attack, whereas this so-called "economic class" actually constitutes but approximately 15 per cent of the population.

Any discussion of this problem necessarily begins with the Thiel case, which has been much discussed not only among the members of the bar but it is a matter of particular interest to the trial judge. In this connection, reference is made to the address by the Hon. Louis E. Goodman, United States District Judge, to the September 1946 Conference of Judges of the Ninth Circuit, and to Judge Harris' opinion in the Thiel case on its remand.

The difficulty in this proceeding has been to interpret and apply the statements, conclusions and apparent holdings of the majority opinion in that case to the practical realities with which the lower courts are confronted in the actual trial of lawsuits.

It is arguable that the Thiel case, in addition to deciding specifically that the act of the clerk and the jury commissioner was unlawful in "systematically and intentionally" excluding men who were paid by the day, also established several other very broad and far-reaching propositions, which may be generally stated as follows: [6]

1. That people who are paid at different times, that is, by the day, or hour, or week or month, or by the piece or otherwise, are in different "economic classes" than those paid differently, regardless of the similarity of their work, personality, background, experience, education, sex, race, religion, politics or other common characteristics. (In this connection, it may be noted that it is argued that that is the whole tenor of the opinion and the statement therein is particularly noted that "laborers who were paid weekly on monthly wages were placed on the jury lists," and the analysis of the majority opinion by Justice Frankfurter in his dissent is also noted in this connection.)

2. That women must be regarded as being in a separate economic "class" from their husbands, regardless of work, personality, background, experience, education, race, religion, politics or other common characteristics. (In this connection, the whole opinion and Justice Frankfurter's analysis of it in his dissent is noted, and particularly the fact that the jury lists contained "the wives of daily wage earners.")

3. That persons of the opposite sex, and persons who are in one "economic class," as a matter of law

without regard to the facts concerning an actual state of mind, are to be regarded as being incapable of being "impartial" to a litigant who is not of the same sex or in the same economic group [7] or class, regardless of similarity of work, background, experience, personality, education, race, religion, politics or other common characteristics. (In this connection, it is to be noted that the constitutional right is to an "impartial" jury, and economic or other class or status is material only as it goes to aid in securing such "impartial" jury.)

4. That if the foregoing three propositions are established by the majority opinion, then the clerk and jury commissioner are charged with the necessity of stratifying a community into "classes," with relation to their social affiliations, sex, religion, race, political affiliation, geographic location, economic status and occupation, and rate and time or method of payment for work done, in order that they may be sure not to devise a system which may exclude persons of a particular class.

While these propositions are not couched in the language used by the defendants in their motions, and are not a complete statement of all their points, they are nevertheless implicit to the legal position which they have taken in making the motions, and it is necessary that these propositions be stated and examined before proceeding further. The Thiel case either marks a fundamental change in what is meant by the right to a trial by an "impartial" jury as guaranteed by the Sixth Amendment or it is but an application of established principles to the

conduct of officials charged in the [8] Federal Courts with the difficult task of selecting jury lists.

It should be stated at this point that the subsequent decision in the Ballard case on December 9, 1946 (*supra*) does not aid in the application and interpretation of the Thiel case. In the first place, the majority opinion in the Ballard case, by quoting with approval a portion of the dissenting opinion of Judge Denman in the same case in the Circuit Court which suggested that the woman on the jury could "rationalize" the conduct of the defendant Mrs. Ballard, and the further statement in the Supreme Court majority opinion that such quotation "illustrates that the exclusion of women from jury panels may at time be highly prejudicial to the defendants," leaves a suggestion, without a definite holding to that effect, that a woman religionist (i. e. a class within a class) suffers actual prejudice amounting to a denial of a constitutional right to an "impartial" jury if women religionists (i. e. a class of occupation within the broader class of the same sex) did not actually sit on both the grand jury and the trial jury. -

In the second place, the majority opinion in the Ballard case indicated that the jury was selected contrary to what was referred to as "prescribed standards" of jury selection, and also speaks of a "departure from the statutory scheme," with no reference whatever to any statute, rule or decision where those "standards" are "prescribed," or where any [9] "scheme" much less "the statutory scheme" for picking a jury which is a "truly repre-

sentative cross-section of the community" is set forth, or referred to, or can be found. The need of such standards and such scheme, or the impossibility of devising one which can be frozen into the language of a statute or rule, is emphasized by the fact that the defendants are challenging the panels in this case on the ground, among others, that it does not appear the lists contained any persons who were paid by the hour.

It is not inappropriate to note in this connection that the new Rules of Criminal Procedure were promulgated by the Supreme Court several years after their decision in the *Glasser* case (*supra* January 19, 1942) which indicated an awareness of the lack of any statutory scheme or prescribed standards in the Federal Courts, but that the new Rules of Criminal Procedure are entirely silent on the subject.

It is also not inappropriate to note that several years before the promulgation of the Rules of Criminal Procedure the Supreme Court in the *McNabb* case (March 1, 1943) asserted for the first time its "supervisory power over the administration of criminal justice in Federal Courts" in procedural matters without a previously promulgated rule or statute governing such procedure to guide the lower courts in the first instance.

However cogently it may be asserted that the four arguable [10] propositions above set forth must be spelled out of the majority opinion in the *Thiel* case, case, I feel that I must reject them. To accept them as binding authority upon the trial courts of the

United States would be to attribute to the Supreme Court an intention, not only to create classes and set one against the other, but actually in the administration of justice to create such confusion and chaos as to make it impossible for any clerk or jury commissioner, or a trial judge sitting in review of their action, to devise a method for the selection of jurors which would not be the subject of subsequent successful attack. To accede to these arguable contentions as to the holdings of that case, in addition to the chaos in the enforcement of criminal statutes as well as in the adjudication of civil rights, would be to eliminate all finality to any judgment depending upon the verdict of a jury or an indictment by a grand jury until the Supreme Court determined in each case whether or not the particular method or process of selecting jury panels for each jury excluded, or resulted in the exclusion of, what the Supreme Court might conclude at that particular moment of decision was a separate, economic, religious, racial, social, political or geographic "class" of persons.

These arguable conclusions must be further rejected for the reason that the Supreme Court based their decision in the case, not upon the ground that there was any substantial [11] prejudice to the appellant—and in this connection the harmless error statute was in the following months in the *Katteakos* case reaffirmed by the Supreme Court, not only in principle but actually in effect—nor did they base their ruling upon a holding that any rule of court or statute has been abridged or violated by either the

clerk or the jury commissioner or the court, nor upon the holding that any constitutional right was infringed, nor any constitutional question involved, but upon what they referred to as their "power of supervision over the administration of justice in the Federal Courts," without reference to any statute or constitutional provision which states or outlines such a power, so that lower court officials in selecting juries could have recourse to such a statutory source of power to determine if such a statute would furnish some guide in the classification of the various groups in the communities or methods for selecting jurors.

Moreover, to so hold would be against at least the rationale of the decision of the Thiel case which reversed the lower court's holding on the ground that it was in violation of "the American tradition of trial by jury." And certainly the American tradition of trial by jury, as well as all other American traditions, are based upon the proposition that under the law all effort shall be made to eliminate distinctions and discriminations between any possible groups and [12] prevent the formation of one "class" or more to set itself or themselves against any other "class." We are still dedicated to the proposition that "all men are created equal" as a self-evident truth.

Another reason why these arguable conclusions cannot be sustained is that the Thiel case must be interpreted and applied not alone in California, the state of its origin, but also in all of the other 48 states, each of which has constitutionally prescribed

its own set of standards of qualification, competency and exemption for jury service, which must be followed by the Federal Courts sitting in those several states, under the mandate of Section 411 of Title 28.

And finally these arguable conclusions must be rejected as the holding of the Supreme Court in the Thiel case because of their impossibility of application to the actualities of life, as illustrated in our attempt to apply them in this case. How can a clerk or jury commissioner or judge of a lower court in reviewing the acts of these officials know whether or not any "economic" or other group is included or excluded until they know, or have a way of knowing from some statute, into what economic or other classes the community is or should or can be divided? The only statutory norms at present are those which relate to political affiliations, geographic location, race, color or previous conditions of servitude, as set forth in Sections 412, 413 and 415 respectively [13] of Title 28.

In this connection, the defendants engaged the services of an assistant professor of sociology and statistics who, with people working under his direction, undertook an analysis and a breakdown into different "economic classes" of the grand and petit jury panels beginning with the February 1946 grand jury (which returned the indictment in this case) and continuing through the names of the jurors who were placed in the master jury box of the court for the term of the current grand and petit juries. The study involved an examination of all available questionnaires (about 1100), supplemented by in-

formation obtained from the city directory, voters' register and by personal telephone calls. The professor was called as an expert witness and testified at length. No effort was made by the witness (or otherwise by the defendants) to classify any of the members of any of the jury panels according to their racial, religious, social, sex, political or geographic status or characteristics, and the defendants, by the expert's testimony and otherwise, limited their evidence to an attempted classification by "economic" classes, or groups.

The classification of "economic" groups used by the witness was limited solely to the classification of employed persons used by the Census Bureau of the United States for the 1940 census, which is Tables 13 and 16 of the pamphlet entitled "The Labor Force for California 1940 Census." These [14] tables apply only to "employed persons" and list 167 occupations for employed males and 77 occupations for employed females. The witness used only the tables as applicable to males, and in his analyses placed all the females on the jury panels in the same occupational classification as their husbands, unless the questionnaire indicated a different one. This was done on the basis of his conclusions that wives generally had the same outlook and viewpoint as their husbands.

The 167 occupational classifications of the Census Bureau are reduced to 12 broad general classifications, and the witness in his analysis places all the persons in the panels in one or the other of these 12 classifications. As against those 167 occupational

classifications, the "Dictionary of Occupations," an official publication of the Department of Labor (1939 Edition) lists 29,000 occupations, of which 7000 occupations are broken into 12 very general broad classifications which follow somewhat the pattern, but actually differ from, the 12 classifications used in the Census Bureau. No data is available of which judicial notice can be taken, and no evidence was offered as to the classification or breakdown of employed persons into the method or time of payment for their work, whether by the hour, by the day, by the week, by the month or by the piece. One of the grounds of challenge by the defendants, as heretofore indicated, is that persons paid by the hour were excluded from the grand jury. Moreover, [15] as against the 167 classifications of occupations used by the witness, I examined about 350 of the questionnaires in evidence at random and listed about 250 different occupations stated by the jurors themselves on their questionnaires.

The 12 general classes of the 1940 census which the witness used, breaks the population as follows:

Under the heading "Professional and Semi-professional Workers" there are 26 occupations listed.

Under the heading "Farmers and Farm Managers" there is one occupation listed.

Under the heading "Proprietors, Managers and Officials, Except Farm," there are 15 occupations listed.

Under the heading "Clerical, Sales and Kindred Workers," there are 17 occupations listed.

Under the heading "Craftsmen, Foremen and Kindred Workers," there are 28 occupations listed.

Under the heading "Operatives and Kindred Workers, there are 38 occupations listed.

Under the heading "Domestic Service Workers" there is one occupation listed.

Under the heading "Farm Laborers" there is one occupation only listed.

Under the heading "Protective Service Workers" there are four occupations listed.

Under the heading "Service Workers, Except Domestic and [16] Protective" there are 10 occupations listed.

Under the heading "Laborers, Except Farm and Mine" there are 26 occupations listed.

It is to be observed, and it is important in the analysis of the testimony, that of the 12 categories only "Domestic Service Workers" and Farm Laborers" are limited to one occupation except for the category "Farmers and Farm Managers." All the others list numerous occupations.

The reporter will copy in the record at this point so that my remarks will be complete the classification of occupations as shown by Exhibit W-2.

A. Professional and Semi-Professional Workers

1. Actors
2. Architects
3. Artists and art teachers
4. Authors, editors and reporters
5. Chemists, assayers, and metallurgists
6. Clergymen

7. College presidents, professors and instructors
8. Dentists
9. Civil engineers
10. Electrical engineers
11. Mechanical engineers
12. Other technical engineers
13. Lawyers and judges [17]
14. Musicians and music teachers
15. Osteopaths
16. Pharmacists
17. Physicians and surgeons
18. Social and welfare workers
19. Teachers (n.e.c.) (including county agents)
20. Trained nurses and student nurses
21. Veterinarians
22. Other professional workers
23. Dancers, showmen and athletes
24. Designers and draftsmen
25. Surveyors
26. Other semi-professional workers

B. Farmers and Farm Managers

C. Proprietors, Managers, and Officials, except farm

1. Conductors, railroad
2. Postmaster, and misc. government officials
3. Other specified managers and officials
4. Props., mgr., and officials (n.e.c.) by industry:
 - a. Mining
 - b. Construction

- c. Manufacturing
- d. Transportation, communication and utilities
- e. Wholesale trade [18]
- f. Eating and drinking places
- g. Retail trade, except eating and drinking places
- h. Finance, insurance and real estate
- i. Business and repair services
- j. Personal services
- k. Miscellaneous industries and services

D. Clerical, Sales and Kindred Workers

- 1. Baggage men, express messengers and railway mail clerks
- 2. Bookkeepers, accountants, cashiers, and ticker agents
- 3. Mail carriers
- 4. Messengers, except express
- 5. Office machine operators
- 6. Shipping and receiving clerks
- 7. Stenographers, typists and secretaries
- 8. Telegraph operators
- 9. Telephone operators
- 10. Other clerical and kindred workers
- 11. Canvassers and solicitors
- 12. Hucksters and peddlers
- 13. Newsboys
- 14. Insurance agents and brokers
- 15. Real estate agents and brokers
- 16. Other sales agents and brokers
- 17. Other salesmen [19]

E. Craftsmen, Foreman and Kindred Workers

1. Bakers
2. Blacksmiths, forgemen and hammermen
3. Boilermakers
4. Cabinetmakers and pattern makers
5. Carpenters
6. Compositors and typesetters
7. Electricians
8. Inspectors (n.e.c.: most inspectors in manufacturing are classified as operatives)
9. Locomotive engineers
10. Locomotive firemen
11. Machinists, millwrights and tool makers
12. Masons, tile setters and stonecutters
13. Mechanics and repairmen, and loom fixers
14. Molders, metal
15. Painters (construction, paperhangers and glaziers)
16. Plasterers and cement finishers
17. Plumbers and gas and steam fitters
18. Printing craftsmen, except compositors and typesetters
19. Rollers and roll hands, metal
20. Roofers and sheet metal workers
21. Shoemakers and repairers (not in factory)
22. Stationary engineers, cranemen, and hoistmen
23. Tailors and furriers [20]
24. Other craftsmen and kindred workers
25. Foremen
 - a. Construction

- b. Manufacturing
- c. Transportation
- d. Miscellaneous

F. Operatives and Kindred Workers

- 1. Apprentices
- 2. Attendants, filling station, parking lot and airport
- 3. Brakemen and switchmen, railroad
- 4. Chauffeurs, truck drivers and deliverymen
- 5. Conductors, bus and street railway
- 6. Dressmakers and seamstresses (not in factory)
- 7. Firemen, except locomotive and fire department
- 8. Laundry operatives and laundresses, except private family
- 9. Linemen and servicemen, telegraph, telephone, power
- 10. Mine operatives and laborers
- 11. Motormen, railway, mine, factory, etc.
- 12. Painters, except construction and maintenance
- 13. Power station operators
- 14. Sailors and decks hands, except U. S. Navy
- 15. Welders and flame-cutters
- 16. Other specified operatives and kindred workers [21]
- 17. Operatives and kindred workers (n.e.c.) by industry:
 - a. Manufacturing
 - Food and kindred products

Tobacco manufacturers
Cotton manufacturers
Silk and rayon manufacturers
Woolen and worsted manufacturers
Knit goods
Other textile-mill products
Apparel and other fabricated textile products
Lumber, furniture and lumber products
Paper, paper products, and printing
Chemicals, and petroleum and coal products
Rubber products
Footwear industries, except rubber
Leather and leather products, except footwear
Stone, clay, and glass products
Iron and steel and specified metal industries
Nonferrous metals and their products
Machinery
Automobiles and automobile equipment
Transportation equipment, except automobile [22]
Other manufacturing industries

b. Nonmanufacturing industries and services

G. Domestic Service Workers

H. Protective Service Workers

1. Firemen, fire department
2. Guards and watchmen
3. Policemen, sheriffs and marshals
4. Soldiers, sailors, marines and coast guards
(Excludes commissioned officers, professional and clerical workers, and craftsmen)

I. Service Workers, Except Domestic and Protective

1. Barbers, beauticians and manicurists
2. Boarding house and lodging house keepers
3. Charwomen, janitors and porters
4. Cooks, except private family
5. Elevator Operators
6. Housekeepers, stewards, hostesses, except private family
7. Practical nurses and midwives
8. Servants, except private family
9. Waiters and bartenders
10. Other service workers, except domestic and protective

J. Farm Laborers

K. Farmers, Except Farm and Mine

1. Fishermen and oystermen
2. Longshoremen and stevedores
3. Lumbermen, raftsmen and woodchoppers
4. Other specified laborers
5. Laborers (n.e.c.) by industry:

6. Construction
7. Manufacturing
 - a. Food and kindred products
 - b. Textiles, textile products and apparel
 - c. Lumber, furniture and lumber products
 - d. Paper, paper products and printing
 - e. Chemicals, and petroleum and coal products
 - f. Leather and leather products
 - g. Stone, clay and glass products
 - h. Iron and steel and not specified metal industries
 - i. Nonferrous metals and their products
 - j. Machinery
 - k. Automobiles and automobile equipment
 - l. Transportation equipment, except automobile
 - m. Other manufacturing industries
8. Nonmanufacturing
 - a. Railroads (including railroad repair shops)
 - b. Transportation, except railroads
 - c. Communication and utilities
 - d. Wholesale and retail trade.
 - e. Personal services [24]
 - f. Other manufacturing industries and services.

To accept this breakdown as a reasonable classification as to economic status would compel the con-

clusion that everybody listed under one, for example, "Professional and Semi-professional Workers," had the same viewpoint and mental attitude toward life as every other one. It would compel the Court to say that a dancer (a chorus girl on Main Street perhaps) had the same viewpoint and mental attitude towards life as a clergyman, regardless of race, religion, education, personality, background or geographic location. Or that a student nurse, working for a pittance, is in the same economic class as an actress making ten if not hundreds of thousands of dollars a year. And the same is true of all the other 26 occupations listed under the first heading, where the only thing in common in that heading is that they have had specialized training in widely divergent fields for the particular occupation.

The impossibility of applying this breakdown as a reasonable and rational one for other than census purposes is illustrated upon examination of all the subheads and occupations listed. It would require the Court to place in the same economic group or "class" a railroad conductor as the millionaire owner of a national chain of newspapers, for instance, or as the millionaire owner of a large oil company, or as a banker or one who owned vast quantities of rental properties. It would belabor the point to continue the comparisons, and the foregoing is sufficient to demonstrate that the occupational classifications used by the witness are completely inappropriate to determine what is a truly representative cross-section of the community with relation to any so-called "economic class."

It is equally sufficient to demonstrate that any other effort to stratify the community into "economic classes" in order to ascertain whether or not any economic class has been excluded, would result in the same kind of a legal cul-de-sac. It is also sufficient to demonstrate that the Thiel case, and the Ballard case as well for that matter, required and intended no such far-fetched conclusions or legal consequences.

I must and do, therefore, conclude that the Thiel case is limited in its holding to the proposition (1) that for a jury panel to be invalid because of discrimination there must be clear evidence of an intent on the part of the jury commissioner or the clerk, or both, to prevent or exclude, or to devise and use a system or method of selection which is calculated and intended by them, or either of them, to result in the prevention or exclusion of any person or group of persons from being called for jury service on account of, and solely because of, either their economic status, occupation, rate or time or method of pay, race, sex, religion, social affiliation or lack of it, political affiliation or the location of their [26] homes geographically in the community, and that (2) in California the power to grant exemptions and excuses is a judicial power within the excluded province of the judge, and any usurpation of that power by the clerk or jury commissioner is unlawful.

By such a construction of the Thiel case it is not only possible to apply it in the actual trial of lawsuits, but no radical departure is made from previ-

ous holding of the Supreme Court on similar questions, and as I read the Thiel case, no radical departure was intended to be made. In examining these cases it is found that in those which involved exclusion of Negroes from grand or petit juries in state courts in violation of the equal protection clause of the Fourteenth Amendment, the Supreme Court pointed out that a statute either specifically excluded Negroes or, if the statute permitted Negroes, it was so administered as to amount to a systematic and intentional exclusion of Negroes by those charged with selecting juries.

In *Strauder v. West Virginia* (1879) 100 U. S. 303, the state law which by its terms permitted only white men for jury service, was challenged as being in contravention of the Fourteenth Amendment. The Court approached the problem by stating the question to be not whether one is entitled "to a grand or petit jury composed in whole or in part of persons of his own race or color, but it is whether, in the [27] composition or selection of jurors by whom he is to be indicted or tried, all persons of his race or color may be excluded by law solely because of their race or color, so that by no possibility can any colored man sit upon the jury." Obviously under the terms of the statute no colored man could or would be selected to serve as either a grand or petit juror, and the Court held the statute void as being in contravention of the equal protection clause of the Fourteenth Amendment.

The question postured by the above language whether "by no possibility can a colored man sit upon a jury" is the same approach which was taken by the Supreme Court in *Smith v. Texas*, with this difference: In *Smith v. Texas* they extended the inquiry to a determination whether or not conduct of officials, under a law which did not exclude colored men, was such as to evidence an intent on their part to devise a system or method which in its operation would exclude any reasonable possibility of excluding colored men. In other words, the Court in *Smith v. Texas* did no more than to extend the *Strauder* holding to cover what was an obvious and deliberate attempt on the part of the officials involved to circumvent the holding of the *Strauder* case and the statutory law of Texas by so devising a system of selection that not only resulted in having so few colored men called, but which also "almost invariably" resulted in a colored man being No. 16 on the list of 16, when only the first 12 who were qualified on the list were to be selected for the grand jury. While the testimony of the jury commissioners (only two out of 96 testified, and I suppose the Court indulged the presumption that witnesses who could be but were not produced would be adverse) showed that they did not intentionally exclude Negroes, the Court pointed out that "chance and accident" could not have been responsible for the only colored man on the list to "almost invariably" appear as No. 16. Thus the decision actually turned on the fact that the Court held that there was a systematic and intentional plan on the

part of someone to exclude Negroes. The nub of the decision, as I read it, was not the number or percentage of Negroes who did or did not appear on the list, but was the intent to exclude them.

In *Smith v. Texas* the Supreme Court did no more than to follow the pattern of inquiry which it had previously followed in *Neal v. Delaware* (1880) 103 U. S. 370; *Carter v. Texas* (1900) 177 U. S. 442; *Norris v. Alabama* (1935) 294 U. S. 587; and *Pierre v. Louisiana* (1939) 306 U. S. 354, were challenges to juries sustained under the Fourteenth Amendment; and in *Gibson v. Mississippi* (1896) 162 U. S. 565, *Smith v. Mississippi* (1896) 162 U. S. 592, and *William v. Mississippi* (1898) where challenges to juries under the Fourteenth Amendment were overruled.

In *Hill v. Texas* (1942) 316 U. S. 400, the Court held that the jury commissioner "consciously" excluded Negroes [29] and in *Akins v. Texas* (1945) 325 U. S. 398, a companion case to *Hill v. Texas*, the Court held against the challenge to the jury on the ground that the evidence showed that the jury commisisoners did not deliberately and intentionally exclude Negroes. None of these cases are contrary to what I have set forth above as the holding of the Thiel case, nor the Glasser case, nor the Ballard case.

Coming now to the evidence in this case. The jury commissioner has occupied that position for the past 16 years. Neither he nor the clerk kept records of the names or the sources of names submitted during that period of time. The commis-

sioner (who, incidentally, testified that the maximum pay received by him was approximately \$15 a year, which he has paid out, and more, in having girls copy lists of names) had to rely upon his memory, except that several comparatively recent lists he had submitted were still in the hands of the clerk and were made available and are in evidence.

The definite testimony as to these lists submitted by the commissioner goes back to the February 1944 list, since which time he has submitted a total of 6708 names, of which 4878 were taken at random by him from the telephone book, 1068 names of women at random from the Southwest Blue Book, 500 names of men from the Southwest Blue Book who lived in Pasadena and that area, 27 names of women from the Friday Morning Club, submitted to him upon his request by the management of the club, 58 names of women from the Ebell Club [30] submitted to him upon his request by the management of that club, 69 names of women from the Congress of Parent-Teachers Association, an organization consisting largely of women covering every section and the city and county, and having for its purpose the fostering of cooperation between parents and teachers, 54 names from a Japanese preacher (there were 12 men and 12 women on that list), and an unidentified number from a list of automobile owners which he had borrowed from someone.

Some point was made by the defendants concerning a list submitted by the commissioner of names of members of the Los Angeles Country Club (a

golf and social club) and of the University Club (a name which is descriptive of its membership) and the California Club (a social club consisting largely of businessmen, if not entirely), but these names did not in total exceed a few hundred, and were submitted by the commissioner at least 15 years ago. None from these sources have been submitted by him since. Of the 6708 names submitted by the commissioner since 1944, it turned out that 4104 are men and the remainder were women.

The present clerk, who has been holding his office since 1942, and prior to that time was a deputy clerk for many years, testified that he followed as near as he knew the same procedure followed by his predecessors since 1924 or 1925.

In addition to the names submitted by the commissioner, [31] the clerk has a filing cabinet with card index drawers which contain the names of 25,000 or 30,000 persons. These are referred to as his "available box." The cards have only the name, address, telephone number if there is a telephone, and previous jury service on them, and nothing else except on an old card occasionally an occupation is listed. The names have been collected by the clerk and his predecessors from various sources since 1925. Practically all of them are the names of persons who have at one time or another served on juries on previous occasions and have thus been found to be qualified under the California law, that is to say, they come within the requirements of the Code of Civil Procedure of the State of California, Sections 198, 199 and 205, requiring that they shall

be citizen over the age of 21, residents of the State and County for one year immediately before being selected, and in possession of their natural faculties and ordinary intelligence and not decrepit, and possessed of sufficient knowledge of the English language and, as prescribed by Section 205 of the Code of Civil Procedure of the State of California, of "fair character and of proved integrity and sound judgment" and have not been convicted of malfeasance in office or any other felony, and have not served upon any jury within at least two years previously.

The clerk of the court has in addition to the names supplied by the commissioner added some other names to the [32] available box of his own selection from time to time such, as he testified, some Chinese recently, the names of approximately 100 persons of the Negro race, gathered for him by one of the deputy clerks, who is also a Negro. In this connection, the commissioner also stated that he submitted some names of Negroes supplied to him upon his request by a Negro preacher. No particular point is made by the defendants concerning the alleged exclusion of Negroes. As a matter of fact, Negroes were on the February 1946 grand jury, and several of them have appeared from time to time throughout the entire last year on trial jury panels in this court. I recall one case where two Negroes were selected and served as among the 12 jurors.

These two sources, that is, the available box of the clerk and the lists submitted by the commissioner, are the sole sources of names.

The procedure followed, which the clerk testified is constantly going on, is that upon receipt of a list of names by the commissioner the clerk will select at random an approximate equivalent number of names from his available box. Since the report of the Conference of Senior Judges in 1942, Exhibit No. 2 in evidence, was received in this District questionnaires have been used on the form of Exhibit B and they have been sent to the names submitted by the commissioner and the recently selected names from the clerk's available box. [33]

Upon return of the questionnaires, the clerk and the jury commissioner go over them together after they have been alphabetically arranged and eliminate those who are incompetent to serve, that is to say, only those who appear on the face of the questionnaire either to be under age, or not citizens, or who appear not to reside any more in the state of California or this District, or not to have resided within it for for one year, and those who are practicing lawyers. Neither the clerk nor the commissioner in any manner attempt to pass on any exemptions or claimed exemption. That is and has been left entirely to the discretion of the senior judge or the judge who impanels the jury.

Upon receipt of an order by the senior judge to put names in the box, which is usually in the form of Exhibit A, tickets of exact size and color, with nothing on them except the name of the prospective juror who has returned a questionnaire, are typed. The clerk will take a sufficient number of such tickets to comply with the order. Then he and the

commissioner will each alternately pick up a ticket, read the name aloud, and drop it into what is referred to as the "master box," from which the panels are drawn. The only names discarded by either the clerk or the commissioner upon this operation is when one or the other knows that the person whose name is called has died or has moved from the community. [34] The master box is the box from which the panels are drawn when a new panel is required for service in the court. The drawing is done in the presence of the Court, the clerk and others, sometimes in chambers and sometimes in the courtroom. The venire is then issued to the marshal, the persons are summoned to appear upon a stated date and hour, at which time the senior or impaneling judge will hear the excuses and grant or deny them as in his discretion should be done. The same procedure is followed for the impanelment of the grand jury, and those names are taken from the master box as above described in identically the same fashion and originate from identically the same sources.

When the master box is emptied, the names remaining in it and those excused temporarily then go back to the clerk's available box. The names of all those jurors who serve go into another box of records kept by the clerk, which he calls the "leave-out box," where they are retained for a period of at least two years, he said usually longer, in accordance with the requirements that a person shall be disqualified under the state law for two years after his last jury duty. At the end of two or more years

these cards are again distributed to the available box, where they are subject to future random selection by the clerk in the manner above set forth.

The defendants contend that this method or system of [35] selecting jurors results in the exclusion of persons in the low income groups which are described in the motion as "laborers, people working by the day or hour, members of labor unions."

The principal evidence offered in support of this contention was the analysis and classification of occupations by the expert witness in his testimony. His bias and manner of testifying detracted considerably from the probative value of his testimony, but even so, considering his testimony in its most favorable light, it does not bear out this contention or support it. He used the 1940 census classification as the basis of his conclusions. As heretofore indicated, I do not consider those classifications as reasonable or appropriate for an inquiry of this nature, but assuming them to be correct for the purpose of applying the expert's testimony, his opinions and conclusions show that of 1103 persons selected for the 1946 and 1947 panels for whom information is available, all of the 12 classes were represented except domestic workers and farm laborers, and as heretofore noted those two classes covered only one occupation. So the effect of his testimony is that all the 167 occupations were represented in the panels except the two just mentioned. Such a result in this complex metropolitan community, with a population of over 3 million in Los Angeles County alone, scattered over an area of

over 4400 square miles, sustaining almost every conceivable kind of [36] business, industry and occupation, cannot be said to be so unfair as to be illegal under the holdings of the cases.

While the expert testified that only once in an astronomical number of times would a panel be drawn with the distribution of occupations which occurred on each of the panels, grand and petit, for 1946 and 1947, the record does not show any computation of probabilities as to the number of times 281 persons (the 1946 panel for which information is available) or 822 persons (the 1947 panel for which information is available) would be selected out of more than 3 million population, with the result that only 2 out of 167 occupations would not be represented.

In speaking of distribution of occupations, attention again is called to the fact that of approximately 350 questionnaires selected at random from those in evidence they show approximately 250 occupations given by the prospective jurors. That list of occupations is as follows:

Painter

Camera Representative

Retired on old age pension

Insurance agent

Real Estate Appraiser

Insurance Manager

Restaurant Owner

Retired

Stage and Property Hand

Furniture Repair Man

Sound Recorder

President of Trucking Company

Manager of a Lumber Business

Petroleum Engineer

Insurance Adjuster

Advertising Business

Real Estate Broker and Notary Public (who wanted to be excused because it interfered with his business)

Manager of a Motion Picture Theater, who was also a graduate lawyer and Special Deputy Sheriff

Telephone Company Employee

Investment Securities on a commission basis

Public Accountant

One-man Real Estate Loans

Railway Accountant (Retired)

Investment Counsel

Numerous "housewives" without any other indication

Statements that a parson is simply "in the banking business" or "insurance business"

Retired Florist

Owner of a bar and cafe

Geologist

Stationary Engineer

Transportation Foreman, Telephone Business

Produce Merchant [38]

Telephone Company Supervisor

Banking Business

Landlord

Field Man

Machinist

Guard
Self-employed
Housekeeper
“Write some fire insurance”
U. S. Army (Retired)
“No business”
“Not working”
Test Desk Man, Telephone Company
Ranching
Electrician
Auto Painter
Lecturer
“None”
Locomotive Engineer
Sound Technician
Electrical Trouble Shooter
Retired Merchant
Statistician
Automotive Machinist
Grocer, Produce [39]
Engineer (Production)
Produce Buyer (who starts to work at 6:00 a.m.)
Grip Man
Secretary, Life Insurance Company
Assistant Camera Man
Widow
Sales Manager
Investments
Telepone Operator
Receiving Clerk
Baker
Tank Truck Salesman

Lead Man

Nurse

Secretary

Truck Driver

“Unemployed”

Motor Man

Liaison Man in Aircraft Plant

Branch Bank Manager

Saleslady

Sound Technician

Escrow Office

Buyer in Department Store

Grocer [40]

Aircraft Worker on New Models for Test Flight

Hardware Salesman

Apartment House Manager

Tool Engineer

Retired Citizen

Oil Leasing

Interior Designer

Upholsterer

Market Research

Draftsman

Fire Insurance

Adjuster

Embalmer

Valuation Engineer

Retired Teacher

Motion Picture Industry, Technicolor, paid by
the hours worked

Income from Real Estate

Meat Cutter

Carpenter

“Not employed at present”

Dispatcher

Artist and Repertoire Phonograph Records

Traffic Manager in the Rock Business

Flight Supervisor

Pullman Porter [41]

Cleaner and Presser

Project Accountant

Engineer, Designer (Aircraft)

Non-active Member of the California Bar

Motion Picture (with the simple claim of exemption: I have to work)

Automotive Mechanic, self-employed

Sales Representative

Timekeeper

Experimental Mechanic

Mason (Contractor who is teaching G. I. apprentices the brick-laying trade)

One-man Sheet Metal Business

A widow doing clerical and stenographic duties, maintaining home for two minor sons

Model

Contractor

Tailoring Cashier

Business Manager

Carpenter

Stenographer

Service Man, Burglar Alarm

Janitor

Maintenance Mechanic

Railway Postal Clerk

Mechanic

Automobile Worker [42]

Letter Carrier

Plant Repair Man

Clerk

Radio

P. B. X. Operator

Laborer (K3), No telephone

Painting Contractor

Apartment Housekeeper

Hay and Grain Dealer

Receiving Clerk in Grocery Store

Music Composer

Appraiser

Traveling Salesman

Assistant to Manager of Credit Union at Film Studios

Stenographer, Board of Park Commission of the City of Los Angeles

Service Station Operator

Saleslady for Mausoleum

Machine Tool Maintenance Man

Foreman of the Telephone Company

Wholesale Produce Business

Retired Construction Engineer

Office Manager

Social Worker

Consignment Clerk

School Nurse [43]

Housekeeper

Design Engineer

General Foreman

Electrical Salesman
Vending Machine Collecting and Service
Secretary-Accountant
General Manager of Radio Station
Bakery Wagon Driver
Paint Department Foreman
Rancher
Journeyman Plumber
Printer's Helper
Office Work
Development Engineer
Practical Nurse
Carpenter Foreman
Stenographer
Furniture Assembler
Registered Pharmacist
Engineer, Storage Battery
Working Man in Laundry
Music Teacher
Aircraft Planner
Motion Picture Producer
Butcher and Meat Cutter [44]
Mechanic and Welder
Surveyor
Repair Man
Motion Picture Equipment Repair Man
Publicity Writer
Auditor
Commercial Fishing
Chemist
Carpenter
Structures Engineer

Grocer

Machinist

Actor

Rate and Percentage Clerk

Janitor

Architectural Designer

Cafe

Truck Driver

Ice Cream Manufacturer

Purchasing Agent

Cashier

Maintenance Foreman Air Terminal

Foreman in Metals Plant

Silver Solderer

One-man Auto Service Business [45]

Barber

Post Office Clerk

Teacher of Chemistry

Consultant Forester, Structural Pest Control

College Student

Home Maker

Service Station Operator

Pay Roll Clerk

Truck Crane Operator

Carpenter

Merchant and Apartment Hotel Operator

Owner, pest Control Service

Tool Designer, Aircraft

Rug and Carpet Salesman

Wholesale Furniture Business Owner

Ball Bearing Engineer

Garage Manager

Traffic Crossing Guard
Hotel Operator
Foreman, Inspection
Foreman, Concrete Emulsions
Actor
Investigator for the District Attorney
Credit Manager
Jeweler [46]
Tool and Die Maker
Mechanic, Street Department, City of Culver City
Distributor
Los Angeles Park Department Foreman
Tool Maker
Fruit and Vegetable Business
Grocer
Distribution Foreman, City Water Department
Assistant Chief Clerk
Police Officer
Deputy City Clerk
Government Accountant
Housekeeper and Apartment Manager
Shop Superintendent
Pharmaceutical Sales
Foreman, Melting Department
Deputy Sheriff
Contractor, Ladies Garments
Materials and Process Coordinator of Army Air
Force
Foundryman
Welder
Electrician
Personnel Assistant, Navy Cost Inspection

Manager of Paint Company

Bank Employee [47]

Auto Electrician

Clothing Merchant

Pilot

Clerk of Textbook Department in School System

Civil Engineer

Truck Driver

Former Teacher

Post Office Clerk

Retired Editor, Publisher and Printer

Meat Market Owner

Many Retired

Numerous Housewives

Many left space blank

* * *

Now that list, of course, does not include a perfect cross-section of the community by occupation, but it does seem to me to be a fairly liberal distribution for that number of persons and does not include, by any means, an examination of all the questionnaires. It cannot be said that those occupations do not cover people who are paid by the hour or who are paid by the day. Unions cut across many of those occupations, if not most of them, and it was conceded that unions cut across all the 167 occupations included in the Census Bureau classification which was used by the expert witness. Who can say if any other method were used [48] that the result obtained would not be an exclusion of some occupational groups, or a more or a different disproportionate distribution of occupations than existed on the 1946

panel or exists on the 1947 panel? And if all occupations were represented, which in the practicalities of life is actually impossible, unless the number of juries is going to be increased far beyond 12 and actually to mob size, would not then someone make a classification of the religions of those selected, or their social connections, or their sex, or their race, or their geographical location, and come up with a statistical abstract which showed disproportionate distributions or exclusions of any of the multitude of religions represented in this community, or a disproportionate distribution or exclusion of any group which might be classified by any other common characteristic? Proportional representation is not possible, nor is it permitted or required under the law. The defendants concede that exact mathematical proportional representation is not required, but assert that disproportional distributions in which a particular occupational group is not represented is invalid. If proportional representation on a panel is not required, then disproportional representation is not invalid, unless it is the result of a systematic and intentional exclusion of persons or groups by the clerk or the commissioner, either directly or by the intentional devising of a system or method of selection, which [49] is bound to result in such systematic exclusion.

The Ninth Circuit had this question before them on June 2, 1941, after the decision of the Supreme Court in *Smith v. Texas*, in the case of *Wong Yim v. U. S.* 118 F. (2d), a case arising in Hawaii where the contention was made that the jury must "repre-

sent each nationality in the Territory” and that the list “did not contain the various percentages of persons of particular nativity,” as that percentage was calculated and set forth in the opinion. As to that contention the Court stated on page 669 of the opinion:

“The rule is that a violation of the clause (due process) occurs if in the jury there is a systematic and arbitrary exclusion of, or a discrimination between, persons of a particular race. (Citing cases, the first one of which is *Smith v. Texas*. In the instant case, there is no evidence to show that the trial jury drawn from the box was obtained either by discrimination or by excluding any name, and the mere fact that the jurors drawn from the list represented only certain races, does not show that the list was made to include only two or three races, or that it was in any manner discriminatory.”

And what applies to persons having the common characteristic of race or nationality applies as well to persons or [50] groups having other common characteristics.

The above case would seem to dispose of the contention of the defendants that the panels are invalid on constitutional or other grounds because they did not, or do not, contain “groups or classes of persons to which the defendants belong.” But there are other reasons which must be noted in not acceding to this contention. The allegations of the

indictment with respect to which group or class the defendants belong must be taken as true for the purpose of this motion, particularly as there was no evidence to the contrary. Those allegations are to the effect that the defendants "are not employees, workers, or laborers who receive a salary or wage for their work or labor, but are independent businessmen engaged in business on their own account, and who operate fishing boats for their own account and profit." A defendant cannot complain because there are too many businessmen on the panel and at the same time prevail because he asserts there are none.

Moreover, it is no denial of any constitutional right, even if there were no persons on the jury panel belonging to the "groups or classes of persons to which the defendants belong." Their right is to an "impartial" jury. It is the right to reject jurors and not to select them. (*Hayes v. Missouri* (1887) 120 U. S. 68; *Spies v. Illinois* (1887) 123 U. S. 131; *Brown v. New Jersey* (1889) 175 U. S. 172; *Howard [51] v. Kentucky* (1906) 200 U. S. 164.) To hold with the defendants in this connection would be to hold that as a matter of law an implied bias existed in the minds of persons of all other groups than a defendant regardless of an actual state of mind (that is the way the question was approached by Chief Justice Hughes in *United States v. Wood* (1936) 299 U. S. 123, where the constitutional question was involved in an ordinance of the District of Columbia) and for the Court to further hold that such other groups would decide cases, not from the

evidence or instructions, but from their prejudices, in spite of an oath to do otherwise. In the *Jugire* case (1891) 140 U. S. 291, the Supreme Court stated "no person is entitled by virtue of the Constitution of the United States, to have his race represented upon the grand jury that may indict him, or upon the jury that may try him." The same thing applies, as indicated, to groups having a common economic or other common characteristics. Every person is entitled not to have his race or persons with other common characteristics purposefully or intentionally and systematically excluded. There is not the slightest evidence in the record in this case that the class or group of persons to whom the defendants belong, or any other class or group, were systematically or intentionally excluded, or that the system used was calculated or intended to result in their systematic exclusion.

Under the system used by the clerk and the commissioner, [52] neither of them have any information concerning the economic status, occupation (except in unusual cases where an old card in the available box shows it), rate of pay, quantity of pay, method of pay or time of pay, nor any information concerning the race, color, religion, political affiliation or social connection or lack of them, prior to the time the information is furnished on the questionnaire by the prospective juror, and only about one-third of those are returned.

The geographic location is of course indicated approximately by the address, and the sex is, or should be, indicated by the name. There is one

exception to the foregoing statement, which is that the name selected by the commissioner from the Southwest Blue Book usually would indicate some type of social affiliation, but not necessarily so. The 1600 names submitted in 1945 from that source have gone through the process of questionnaires, and it is a fair inference that their response was not better than the average, which would reduce the number considerably. Moreover, they have been subjected to reduction by excuses and the like, so that the remaining ones have now lost all their identity in the available box of 25,000 or 30,000 names, so that it cannot be said that the use of that source is or could be any ground of illegality.

Likewise, the names secured by the commissioner from women's clubs are too small in number to be of legal significance [53] in this matter. The commissioner testified that by far the greater number of names submitted by him were taken at random from the telephone book. In selecting names he paid no attention to the type of name, he testified, or the address, or the telephone prefix, or the occupation if it was indicated, and there is no way of knowing from the telephone book the race, religion, economic status, rate, quantity or method or time of pay, political affiliation or social affiliation, or lack of them, of a person whose name is listed. The only information supplied by the questionnaire which relates to any of the above mentioned group characteristics is the occupation of the prospective juror.

Both the clerk and the commissioner testified that at no time did they together, or either one by himself, leave any name off a jury list on account of any fact relating to a person's economic status, race, religion, social affiliations, or lack of them, politics, or occupation, or rate, quantity or method or time of pay. And no evidence of any nature was offered to controvert their testimony or weaken or impeach it in any degree. Indeed, it is difficult to see how, with the paucity of information available to them about each prospective juror, they could have devised or followed any system of exclusion on any of the grounds mentioned.

Considerable point was made in argument against the commissioner's use of the telephone book. The choice of sources [54] for jurors is vested by statute in the jury commissioner and the clerk (28 U.S.C. 412). There is no master list of all the persons in this District or this county, nor is there a master list of eligible or competent or qualified persons. The largest lists of names, and hence the nearest ones to being a cross-section of the community, are contained in the city directory, the telephone directory and the voters' register. The city directory has not been published since 1942, due to the paper shortage. Assuming that a voters' printed list were available to the commissioner, the question is, does the use by the jury commissioner of the telephone directory void the jury lists? I think not.

The telephone directory, the city directory and the voters' register are each compiled without reference to race, religion, social status or lack of it,

occupation, method, rate, quantity and time of pay, political affiliation or geographical location in the area involved, except that the voters' list does of course disclose the political affiliation. It used to disclose occupation, but the voters' list does not disclose occupation any more.

No economic status is required for listing in any of the three except that a person must desire to have a telephone and be able to pay the monthly rental for it. The defendants argue that the use of the telephone directory is thus a systematic and intentional exclusion of those of the [55] working-class who cannot afford a telephone. Arguments can be made against the use of any list, as none are available for the whole population. The clerk and the commisisoner in the Thiel case used the city directory, and it is noted that such use was not condemned or commented upon by the Supreme Court.

While the Supreme Court in *Akins v. Texas* was dealing with a state jury commissioner, they very pointedly remarked that the alternative to a wide discretion in the officials charged with the selection of juries would be "a list composed of all the eligibles within the trial court's jurisdiction and selection of the panel by lot." As indicated, no such list is available, and I do not know when it is likely to be or if it ever will be.

It is true that the voters' lists would eliminate all those who were under 21, all those who have lived in California less than one year, and all those who lost their civil rights by conviction of a crime, which are grounds of disqualification of jurors. It

is also true that I or any other person might use other methods than either the clerk or the jury commissioner to secure available material or a jury list, but I cannot say because the voters' lists or some other list was not used that the methods and lists which were used by the commissioner and the clerk were illegal, or resulted in the unlawful selection of juries, either grand or petit. [56]

The making of the jury list is not a judicial act. (*Clinton v. Englbrecht*, 13 Wall 434, 446). The manner of securing names for the jury lists is for the clerk and the jury commisisoner to determine; the duty is non-delegable and no other person has a right to participate in such selection (*Walker v. U. S.* 93 F. (2d) 383, certiorari denied 303 U. S. 644; *In Re Petition for Special Grand Jury* (1931) 50 F. (2d); *United States v. Murphy*, 224 F. 554; and *Glasser v. United States* (1942) 315 U. S. 60, 85), except that a court may, under 28 U. S. C. 413, direct the jurors to be selected from such parts of the district as shall "not incur unnecessary expense or unduly burden the citizens of any part of the district."

In *United States v. McClure*, 4 F. Supp. 668, the Court stated, with relation to the duties of the officers of the District Court charged with the matter of securing jury lists, that it "is their responsibility, and no court has the right to tell the duly constituted jury commissioners how they shall discharge the duties and responsibilities imposed upon them by the law. The court has the power only to declare their actions null and void under circumstances of malfeasance or misfeasance."

While there is some language in both the majority opinion and the minority opinion in the Thiel case, as well as in the Ballard case, from which it might be argued that the [57] Supreme Court intended to say the District Judges have the power to direct the method or system to be used by the clerk and the jury commissioner in the selection of jury material, it is my judgment, in view of the holdings of the cases last cited, as well as all the other cases cited in my remarks, that this court has no such power but may only sit in review of their acts and conduct. And it is my conclusion, in the exercise of that power of review, that neither the clerk nor the commissioner showed any bias or prejudice in the selection of names or sources of names of prospective jurors, and that neither of them systematically or intentionally or arbitrarily excluded any person or persons, or groups or classes of persons, either on account or because of economic status, occupation, rate or quantity or method or time of pay, race, religion, sex, social connections or affiliations, or lack of them, or political affiliations; nor does the system and method or process used by them now or for the 1946 grand jury result in such exclusion. The geographic selections made by them were in accordance with the various orders of the senior judge made pursuant to the command and the power given him in 28 U.S.C. 413.

It follows, therefore, that the motion to dismiss the indictment and the motion to strike the 1947 jury panel are both denied. [58]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 13th day of March, A. D., 1947.

AGNAR WAHLBERG,
Official Reporter.

Los Angeles, California; March 17, 1947;
2 o'Clock p.m.

THE IMPANELMENT OF THE JURY

* * *

The Court: Very well. The Government is allowed six preemptory challenges and the defendants ten. The Government will take one and the defendants two until the remaining challenges are equal.

* * *

(The following proceedings were had outside the presence of the jury):

The Court: By the way, I stated at the commencement of the impanelment of the jury that the

Government would be entitled to six challenges and the defendants ten. Upon having another look at the rules I see that they have had changes where the punishment is either a fine or not more than a year imprisonment, where it is three to each side, but the Court may in its discretion allow more than three to the defendant, if there is more than one defendant. The Government has now exercised one and the defendants have exercised three. I would like to have a suggestion from the defendants——

* * *

Mr. Kenny: The only difficulty with that, your Honor, is having indicated ten we have challenged with that in mind. I don't think the rules can be changed in the middle of the game without working a material prejudice to the defendants, and we would have to object to it.

The Court: If you do not want any more, that is all right with me.

Mr. Kenny: We may ask for more. We will raise that when we get to ten.

The Court: I think that I will fix ten now.

* * *

Mr. Dixon: To be exercised jointly by all defendants?

The Court: By all defendants.

Mr. Margolis: That is our understanding.

* * *

(Here followed further impanelment of the jury.)

The Court: Any questions from the Government?

Mr. Dixon: No questions.

The Court: Any further questions from the defense?

Mr. Margolis: None, your Honor.

The Court: Both sides accept the jury?

Mr. Margolis: May we approach the bench?

The Court: You cannot do that. You have to get all your defendants up here.

Do you want alternates?

Mr. Dixon: Yes, your Honor.

The Court: There is room in the box for two alternates.

Mr. Andersen: May it please the Court, at this time on behalf of the defendants we represent we request the Court, pursuant to discretion imposed in the Court, to grant the defendants additional challenges. I respectfully request the number 5, bearing in mind that we represent a large number of defendants in this case. We would like to have five more pre-emptory challenges, may it please the Court.

The Court: I think ten is a fair number. The statute only permits three where ordinarily the statute permits ten. It used to permit more, but the statute seems to be case in the frame of not allowing the same latitude. I suppose that Congress had its own reasons. I think ten is sufficient. The Government cannot go on any more. They have only three in any event. I announced three before and indicated after recess that I thought that I had

made a mistake in stating the number of challenges regularly allowed and fixed ten. Counsel stated that they thought we shouldn't change in the middle of the stream and for that reason, that appeared to be a good reason to them then, and it appears to be a good reason now. The motion is denied.

Mr. Andersen: May we renew our request for more challenges?

The Court: The motion is denied.

Mr. Andersen: Three?

The Court: The motion is denied for any in excess of ten.

* * *

Is there any objection to alternate jurors?

Mr. Margolis: No objection.

The Court: The rules permit as many as four alternates. We have seats for two. It would seem to me that it might be wise in this case to have alternate jurors. I have no idea how long we are going to be.

Mr. Margolis: We have no objection.

The Court: Do you have any objection?

Mr. Garrett: I have no objection.

The Court: Does the Government have any?

Mr. Dixon: No objection, your Honor.

The Court: The Clerk will fill the box with alternates.

Rule 24(c) states in part:

"Each side is entitled to one preemptory challenge in addition to those otherwise allowed by law if one or two alternate jurors are to be

impaneled, and two preemptory challenges if three or four alternate jurors are to be impaneled."

The Clerk will call two alternate jurors.

(At this point two alternate jurors were duly impaneled.)

The Court: Any questions?

Mr. Margolis: No questions.

Mr. Dixon: No questions.

Mr. Garrett: No questions.

The Court: The Clerk will swear the jury.

Mr. Andersen: Before the alternates are sworn, may it please the Court, we respectfully ask that we be granted two additional challenges in so far as the alternates are concerned.

The Court: I do not think I can do that on the alternates. In any event, that motion is denied.

Mr. Andersen: I renew the motion for one, may it please the Court.

The Court: The motion is denied for any in excess of that already taken.

* * *

(At this point a jury of 12 were duly sworn by the Clerk.)

The Court: Swear the alternates.

(At this point the two alternates were duly sworn by the Clerk.)

[Endorsed]: No. 11638. United States Circuit Court of Appeals for the Ninth Circuit. Local 36 of the International Fishermen and Allied Workers of America, Jeff Kibre, Gilbert Zafran, Clifford C. Kennison, F. R. Smith, George Knowlton, Otis W. Sawyer, W. B. McComas, Harry A. McKittrick, Arthur D. Hill, C. Lloyd Munson, Charles McLauchlan, Robert M. Phelps, Burt D. Lackyard, and Ray J. Morkowski, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed August 18, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

Cr. No. 11638

LOCAL 36 OF THE INTERNATIONAL FISH-
ERMEN AND ALLIED WORKERS OF
AMERICA, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANTS INTEND TO RELY ON
APPEAL * * *

To the Honorable Justice Francis A. Garrecht, and
Associate Justices of the United States Circuit
Court of Appeals for the Ninth Circuit:

Appellants respectfully state that the following
are the points upon which they intend to reply on
appeal, to wit:

1. The indictment on which appellants were convicted does not state a public offense against the laws of the United States;
2. The verdicts and findings of guilt are contrary to law;

3. The verdicts and findings of guilt are contrary to the evidence and the evidence is insufficient to support the verdicts;
4. The District Court erred in denying appellants' motion to dismiss the indictment on the grounds that the Grand Jury which returned said indictment was improperly selected in the respects set forth in said motion;
5. The District Court erred in denying the challenge to and motion to strike out the entire trial jury panel;
6. The District Court erred in denying appellants' motions for acquittal at the conclusion of the Government's case, and at the conclusion of all the evidence;
7. The District Court erred in admitting evidence offered by the appellee;
8. The District Court erred in excluding evidence offered by the appellants;
9. The District Court erred in instructing the jury;
10. The District Court erred in denying the motion of the above named appellants to strike all exhibits and testimony;
11. The District Court erred in granting the motion made by certain witnesses on April 18, 1947 to quash subpoena duces tecum;

12. The District Court erred in denying the motion of the above named appellants in arrest of judgment;
13. The District Court erred in overruling appellants' motion for a new trial.

* * * * *

KATZ, GALLAGHER &
MARGOLIS,
GLADSTEIN, ANDERSEN,
RESNER & SAWYER,
KENNY & COHN,

By /s/ ROBERT W. KENNY,
Attorneys for Appellants.

Received a copy of the foregoing Statement of Points and Designation of Portions of Record upon which appellant expects to rely on appeal on this 28th day of August, 1947.

/s/ WILLIAM C. DIXON,
Attorney for Appellee.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION RE ORIGINAL EXHIBITS
ON APPEAL

It Is Stipulated, subject to the approval of the United States Circuit Court of Appeals for the Ninth Circuit, that the original exhibits heretofore filed with the Court need not be printed in the record but may be referred to by the parties hereto and considered by the Court as though they were incorporated in the printed record. Any material portions of these said exhibits may be printed in the brief of either party and referred to therein.

Dated: August 21, 1947.

KATZ, GALLAGHER &
MARGOLIS,
GLADSTEIN, ANDERSEN,
RESNER & SAWYER,
KENNY & COHN,

By /s/ ROBERT W. KENNY,
Attorneys for Appellants.

/s/ WILLIAM C. DIXON,
Attorney for Appellee.

Pursuant to the foregoing, It Is So Ordered:

Dated: This 30th day of August, 1947.

/s/ FRANCIS A. GARRECHT,
Judge.

